

*United States Court of Appeals
for the Second Circuit*



APPENDIX

76-1098

B
P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee.

vs.

IRVING BEHRMAN,

Defendant Appellant.

*Appeal from Judgment of United States District Court for the
Southern District of New York*

APPELLANT'S APPENDIX

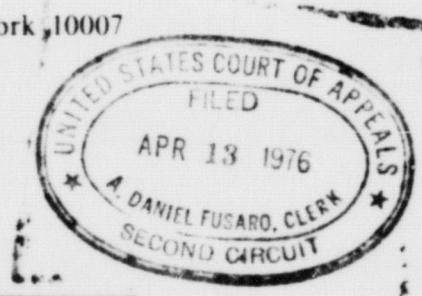
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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

DOCKET ENTRIES

D. C. Form No. 100 Rev.

JUDGE CHRISTIAN

1a

75 CRM. 293

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
U.S.	Robert P. Walton, AUSA,
IRVING BEHRMAN	791-1926

(03)	STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
	J.S. 2 mailed	Clerk				
	J.S. 3 mailed	Marshal				
	Violation	Docket fee				
	Title 26					
	Sec. 7206(1)					
	False income tax returns.					
	(Two Counts)					

DATE	PROCEEDINGS
3-21-75	Filed indictment.
3-31-75	Deft. (atty. present) Pleads not guilty. Motions returnable in 10 days. Bail fixed at \$20,000. P.R.B. Ordered photographed and fingerprinted. Case assigned to Gagliardi for all purposes. Brieant, J.
3-31-75	Filed P.R.B. in the amount of \$20,000.
4-07-75	Filed notice of appearance of atty.
09-03-75	Filed Stip. & Order that deft. waives to his rights to a speedy trial, etc. Gagliardi, J.
9-16-75 12-5-75	Filed Govt.'s acknowledgment of constitutional rights. Before Judge Gagliardi jury trial begun.
12-8-75	Trial cont'd.
12-9-75	Trial cont'd. and concluded. Deft. guilty on counts 1 & 2. P.S.I. ordered for sent. 2-3-76 at 9:30. Deft. R.O.R. \$20,000. P.R.B. Bail limits same as R.O.R. Gagliardi, J.

Docket Entries

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DATE	PROCEEDINGS
-8-76	Filed transcript of record of proceedings, dated <i>Dec 5 & 9, 1975.</i>
-21-76	Filed Govt.'s memo. in opposition to post-trial motions.
1-26-76	Filed Deft.'s memo. of law in support of post-verdict motion to set aside the verdict and dismiss the indictment.
2-10-76	Filed Govt's reply memorandum in opposition to post-trial motion.
-23-76	IRVING BERRMAN-(atty. present) Filed Judgment-cts. 1 & 2-6 mons. impr. ea. ct. conc. 3 yrs. prob. w/super. FINED \$2,500. on ct. 1. FINED \$2,500. on ct. 2. TOTAL FINE \$5,000. to be paid. Deft. to pay the cost of prosecution. Deft. R.O.R. pending appeal. Gagliardi issued all copies.
-26-76	Filed deft.'s notice of appeal from judgment of 2-23-76. mailed copies.

INDICTMENT (FILED MARCH 21, 1975)

3a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :

75 CRIM. 298

- v -

IRVING BEHRMAN,

Defendant. :

INDICTMENT
75 Cr.

-----x
COUNT ONE

The Grand Jury charges:

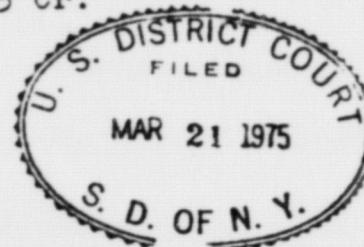
On or about April 15, 1969, in the Southern District of New York, IRVING BEHRMAN, the defendant, unlawfully, wilfully and knowingly did make and cause to be made, and did subscribe, his joint United States Individual Income Tax Return, Form 1040, filed with the Internal Revenue Service for the calendar year 1968, which contained and was verified by a written declaration that it was made under the penalties of perjury and which he did not believe to be true and correct as to every material matter, in that said Form 1040 reported adjusted gross income of \$15,594.68 whereas, as he then and there well knew and believed, the reported adjusted gross income did not include substantial amounts received by him during that year from customers who purchased merchandise from him.

(Title 26, United States Code, Section 7206(1) and Title 18, United States Code, Section 2.)

COUNT TWO

The Grand Jury further charges:

On or about April 14, 1970, in the Southern District of New York, IRVING BEHRMAN, the defendant, unlawfully, wilfully and knowingly did make and cause to be made, and did subscribe, his joint United States Individual Income Tax Return, Form 1040,



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RPW:mr
d-89

filed with the Internal Revenue Service for the calendar year 1969, which contained and was verified by a written declaration that it was made under the penalties of perjury and which he did not believe to be true and correct as to every material matter, in that said Form 1040 reported adjusted gross income of \$20,205 whereas, as he then and there well knew and believed, the reported adjusted gross income did not include substantial amounts received by him during that year from customers who purchased merchandise from him.

(Title 26, United States Code, Section 7206(1) and Title 18, United States Code, Section 2.)

Curran/Official

FOREMAN

Paul J. Curran

PAUL J. CURRAN
United States Attorney

JUDGMENT AND PROBATION COMMITMENT ORDER (FILED 5a
 February 23, 1976) **United States District Court** for
 United States of America vs. *Closed*
DEFENDANT THE SOUTHERN DISTRICT OF NEW YORK
 LEVING BEHRMAN DOCKET NO. 75 Cr. 798

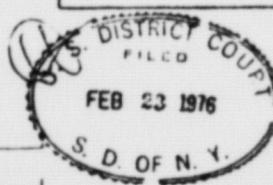
JUDGMENT AND PROBATION/COMMITMENT ORDER AO 255-10-4

COUNSEL	<p><input type="checkbox"/> IN the presence of the attorney for the government <input checked="" type="checkbox"/> the defendant appeared in person on this date</p>	MONTH DAY YEAR February 23, 1976
PLEA	<p><input type="checkbox"/> WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.</p> <p><input checked="" type="checkbox"/> WITH COUNSEL <u>IRVING ANOLIK</u> (Name of counsel)</p>	
FINDING & JUDGMENT	<p><input type="checkbox"/> GUILTY, and the court being satisfied that <input type="checkbox"/> NOLO CONTENDERE, <input type="checkbox"/> NOT GUILTY</p> <p>There being a finding/verdict of { <input type="checkbox"/> NOT GUILTY. Defendant is discharged <input checked="" type="checkbox"/> GUILTY.</p> <p>Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly did make and cause to be made false income tax returns for the years 1968 & 1969. (Title 26, United States Code, Section 7206 (1) and Title 18, United States Code, Section 2.)</p>	
SENTENCE OR PROBATION ORDER	<p>The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of <u>SIX (6)</u> MONTHS on each of counts one and two CONCURRENTLY. Defendant is placed on probation for a period of <u>THREE (3)</u> YEARS, subject to the standing probation order of this court.</p> <p>The defendant is FINED TWO-THOUSAND FIVE HUNDRED (\$2,500.00) on count one. The defendant is FINED TWO-THOUSAND FIVE HUNDRED (\$2,500.00 on count two. The fines (Total: \$5,000.00) are to be paid by the defendant or the defendant is to stand COMMITTED until the fines are paid or he is otherwise discharged according to the law.</p> <p>The defendant is to pay the cost of prosecution.</p> <p>The defendant is released on his own recognizance pending appeal.</p>	
SPECIAL CONDITIONS OF PROBATION		
ADDITIONAL CONDITIONS OF PROBATION	<p>In addition to the special conditions of probation listed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.</p>	
COMMITMENT RECOMMENDATION	<p>The court orders commitment to the custody of the Attorney General and recommends,</p> <div style="border: 1px solid black; padding: 5px; margin-left: 20px;"> <p>It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.</p> </div>	

SIGNED BY
 U.S. District Judge
 U.S. Magistrate

Lee P. Gagliardi

Date 2/27/76



EXCERPTS FROM PROCEEDINGS BEFORE GAGLIARDI, D.J.
ON DECEMBER 5, 8, 9, 1975 (TRIAL)

6a

jha51

At this time, your Honor, under the rules I move for a dismissal on the grounds that the government has not made out a sufficient case to warrant this case going to the jury. I submit, your Honor, that the government here has failed to establish that any income was earned by this defendant upon which he had to report on his tax return. In other words, the government has taken the position apparently, as I see it, your Honor, that they have established that Harold Roth is Mr. Behrman. They have also purported to demonstrate through the witnesses who testified that an account existed in the name of Harold Roth with the Bank of Tokyo in New York City, your Honor. They showed the facts that there were monetary transactions going through that account, period. They have shown nothing beyond that, your Honor. They have not shown that that was earned income, they have not shown that that was taxable capital gains, they have not shown that that was any money whatsoever upon which any tax had to be predicated.

In short, your Honor, they have not satisfied the requirement that this is reportable income at all, in any way, shape or form, and I would ask that a dismissal be given on the grounds that this is an insufficient

1 jha52

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2 case as a matter of law.

3 THE COURT: Mr. Wohl.

4 MR. WOHL: Yes, your Honor. First of
5 all, the government submits we have shown more than that
6 in that we have shown that the way that Mr. Behrman
7 acting as Mr. Roth got the money was through engaging
8 in activity which would appear to be commercial activity,
9 i.e., selling goods to Wagner-Nelson and selling goods --
10 I think he got some of the money from Mr. Gilman --
11 selling goods to Mr. Gilman, asking that the checks be
12 made out to Harold Roth, which gives more of the appear-
13 ance of income than it would if there were no indications
14 whatever as to how Mr. Berman came by the money.

15 In addition, we believe that we are entitled
16 to a presumption here which is essentially that where
17 it is shown that the taxpayer had cash receipts that
18 unless otherwise explained it is presumed to be income,
19 and we rely for that on *United States against Lacob*,
20 416 F. 2d 756, Seventh Circuit, 1969, Cert. Denied 396
21 U.S. 1059, 1970, which was cited with approval in
22 *United States vs. Slutsky*, 487 F. 2d 832 at 840, by
23 the Second Circuit.

24 The point that the Slutsky court decided
25 Lacob on was a related point, and that was in a tax eva-

1 jha53

2 sion case, where you have essentially the same type of
3 proof, there a bank deposits method case, where, of
4 course, all the government proves is that the defendant
5 ended up with more than he started out with, and that
6 was its case in chief, Slutsky noted, citing Lacob,
7 that even -- the government is entitled to a presump-
8 tion that it is income and the government is entitled
9 to an additional presumption that there were not any
10 deductions or expenses that would have rendered
11 that income to be without tax consequences, and the burden
12 is then on the defendant to come forward and explain
13 why that isn't income, and in a tax evasion case, why
14 there are deductions or exemptions or credits, or whatever,
15 that deprive that money of having tax consequences.

16 So in sum the government makes two points.

17 First of all, we believe we have shown circumstances
18 which indicate that it is income, i.e., that Mr.
19 Behrman got the money through engaging in business rather
20 than inheriting it or something else, with Wagner-Nelson
21 and Charles Gilman, and secondly, that we are entitled
22 to the presumption that it is income at this point.

23 MR. ANOLIK: May I be heard, your Honor?

24 THE COURT: Yes.

25 MR. ANOLIK: Your Honor, I respectfully

1 jha54

2 submit that Mr. Wohl may be confusing this with a
3 civil case. In a tax fraud case, your Honor, the
4 government either tries to prove that there was income
5 due to a net worth type of theory, namely, that the cost
6 of goods sold was less than money received therefor.
7 They have made no effort to show what the cost of goods
8 sold here was or the money received against the cost of
9 goods sold.

10 The second thing is a nonreporting of taxable
11 income. They cannot rely upon the presumption and
12 then tell this court that that presumption now places
13 a burden upon a defendant to rebut. This is not, your
14 Honor, a situation where you have possession of nar-
15 cotics, for example, or recently stolen property, where
16 certain presumptions might be raised. Where you
17 have exclusive, unexplained and recent possession of stolen
18 property there is a presumption, it is true, that
19 you might have stolen it. That is not the type of case
20 you have here. This is an income tax fraud case, not
21 an evasion case, such as the Slutsky case. And I
22 have some familiarity with the Slutsky case and I do not
23 think that it is in point here.

24 THE COURT: That involved the Nevele Hotel
25 up in the Catskills.

1 jha55

2 MR. ANOLIK: That's correct. They put,
3 as I understand, money in their own savings accounts
4 which clearly should have been put in another account.
5 I don't know all the details of the case because I
6 wasn't the attorney there, but having read the opinion
7 some time ago, your Honor, I have a recollection of those
8 facts, and it does not seem to be in all fours with
9 this case at all. The government here has not estab-
10 lished that any income was earned. In fact, the
11 inference would be to the contrary in view of the
12 testimony of Gilman that this was the lending of money,
13 returning of money, the repayment of gambling debts.
14 He didn't say anything about income. No one testified
15 that there was income here. No one testified as to
16 cost of goods sold. There is no evidence that this was
17 reportable at all.

18 THE COURT: I know there is no proof of
19 cost of goods sold, but under these cases doesn't the
20 burden shift, not the burden resting upon the defendant,
21 but doesn't the burden shift to the defendant to
22 explain --

23 MR. ANOLIK: Your Honor, the Supreme
24 Court dealt with that burden just in this last term and
25 for the life of me I don't remember the name of the

1 jha56

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2 case, but I can tell you the case. It wasn't this
3 particular point, but it involved a question of murder
4 where a defense of a manslaughter was interposed and I
5 think the Maine court said that the burden shifted
6 to the defendant to prove that he had such a state
7 of mind that it could not have been murder, he would
8 have to prove that it was an emotional factor that made
9 it manslaughter. The Supreme Court of the United
10 States said you cannot place a burden of going forward
11 in a criminal case upon a defendant ever.

12 THE COURT: I am looking at the case of
13 Siravo vs. United States, a First Circuit case in 1967,
14 377 F 2d 469, in which the court states:

15 "The applicable rule here is that uniformly
16 applied in tax evasion cases."

17 MR. ANOLIK: Evasion, not fraud. This
18 is not an evasion case, your Honor. This is a fraud
19 case.

20 THE COURT: The Siravo case --

21 MR. ANOLIK: In fact, the government abjured
22 that this was an evasion case when they started. They
23 told the jury that.

24 THE COURT: The Siravo case is a 7206(1),
25 which is what we have here. It is the same section

1 jha57

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2 of the statute. That case says, as I said before:

3 "Evidence of unexplained receipts shifts to
4 the taxpayer the burden of coming forward with evidence
5 as to the amount of offsetting expenses, if any."

6 Isn't that the rule, Mr. Anolik?

7 MR. ANOLIK: Your Honor, the case has
8 a vague -- I don't specifically remember that case as
9 such, your Honor.

10 THE COURT: I will give it to you.

11 MR. ANOLIK: Fine, your Honor. I would
12 say this: If that is the import of the case I would
13 ask that the court rule the case is unconstitutionally
14 decided on the grounds that the taxpayer in a criminal
15 case may never be put upon his proof to take the stand
16 to disclaim what the government has said where the
17 government concededly has not established that there was
18 any taxable income, they are relying solely upon a pre-
19 sumption and nothing else.

20 THE COURT: Isn't that sufficient to go
21 to the jury? That doesn't mean that I could direct
22 a verdict of guilty. It still becomes a question of
23 fact for the jury.

24 MR. ANOLIK: Your Honor, the point is --

25 THE COURT: With the caution of the court
that there is no burden upon a defendant in a criminal

1 jha58

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2 case ever to present any evidence of any kind.

3 MR. ANOLIK: Except, your Honor, that in
4 this case it seems to me the government had to go a
5 little bit further than they went. I don't think they
6 even have risen to the point where you can infer such
7 a presumption, because all they have shown is that there
8 was money passing into an account. They have not shown
9 the transactions in that account. Obviously there
10 was merchandise shipped. There is no denial of that.

11 THE COURT: I am not sure there is any
12 proof one way or the other.

13 MR. ANOLIK: Mr. Gilman said that he pur-
14 chased over a number of years merchandise.

15 THE COURT: Gilman says he purchased mer-
16 chandise?

17 MR. ANOLIK: Not Gilman; Wagner. He
18 admitted that on the stand, that he purchased merchan-
19 dize. In fact, he was a customer for a number of
20 years, your Honor.

21 THE COURT: There is a complete absence
22 of proof in here as to these payments being made in
23 support of shipments, isn't there? Is there any proof
24 whatsoever, one way or the other.

25 MR. ANOLIK: I think that Wagner clearly

1 jha59

2 said so, your Honor. The checks even say it. On
3 the fact of the check it says in payment for invoice
4 so-and-so.

5 THE COURT: Invoices, yes. But does
6 that mean shipment of goods. Is there any proof one
7 way or the other.

8 MR. WOHL: I don't think he was specifically
9 asked, your Honor.

10 THE COURT: He wasn't specifically asked,
11 as I remember. He said he made these payments against
12 invoices received.

13 MR. ANOLIK: He said he bought things from
14 the defendant and he also said he was having trouble
15 paying and that pressure was being put upon Mr. Behrman,
16 according to what he was told, to see that he got paid.

17 MR. WOHL: I think the teaching of all of
18 these cases, as I see it, including Siravo and the
19 ones that I cited, is basically that if the defendant
20 had cost of goods sold or whatever that would affect
21 his tax liability, then he has to come forward and explain
22 it, because the law tends to recognize that the govern-
23 ment doesn't have possession of this type of information,
24 this is all information that only the defendant has.

25 THE COURT: Would it have been sufficient

1 jha60

2 if you had put in here through Mr. Wagner what in fact
3 were the costs? That wouldn't do anything, would it?

4 MR. WOHL: No. We don't have any way
5 of knowing what Mr. Berhman paid for goods, if he paid
6 anything.

7 THE COURT: You can just show his re-
8 ceipts, that's all.

9 MR. WOHL: That's right. Really that
10 would be an interesting point for the defense if this
11 were an evasion case, because then it would be import-
12 ant to know not only whether he got any receipts, but
13 also whether he made any profit. But in this case --
14 incidentally, we think based on the Lacob case and
15 other cases in that line of cases, I think the Bender
16 case in the Seventh Circuit particularly focuses on the
17 point and explains the reason why we have this rule
18 that the government doesn't know what the receipts are
19 or what the expenses are. The point is that we get
20 around all that since we are in what is in fact a
21 lesser included offense, tax evasion, i.e., the filing
22 of a false tax return. So even if the man had extensive
23 costs of goods sold he would have to report the gross
24 receipts and then report what he paid for the goods and
25 come out with a profit by filing either a sole proprietor-

1 jha61

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2 ship or some other kind of business tax return.

3 THE COURT: All right. You are welcome
4 to look at this Siravo case.5 MR. ANOLIK: Yes. Your Honor, would
6 you have any objection if I spent two or three minutes
7 talking to my client?8 THE COURT: No. We are going to take
9 a 10-minute recess.10 MR. ANOLIK: Thank you very much, your
11 Honor.

12 (Recess.)

13 (In open court; jury not present.)

14 MR. ANOLIK: Your Honor, I may be misreading
15 the case, but at 473 of the Siravo case it seems to
16 articulate the rule that I always thought was applicable.
17 The court says:18 "Indeed, this case is necessarily included
19 in the rule for in a tax evasion case the government's
20 ultimate burden is to show that the taxpayer received
21 not only gross income but also taxable income after de-
22 duction of capital and noncapital expenses. If that
23 is satisfied," meaning that burden, "such sales receipts
24 absent explanation, so must the lesser burden here."

25 Apparently they go on to indicate that in

1 jha62

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2 this case, at least as I follow it, no return was filed
3 at all, your Honor.4 THE COURT: I think the general proposi-
5 tion is stated in there, after having looked at the two
6 cases cited by the government, including Slutsky,
7 which is the most recent one in the Second Circuit, that
8 the government has presented enough proof to withstand
9 the motion to dismiss at this stage.

10 MR. ANOLIK: Very well, your Honor.

11 THE COURT: Therefore, the motion is
12 denied, with an exception.13 Do you want to put this stipulation on in
14 front of the jury and then have the government rest
15 and then consider that the motion was made then and
16 the same ruling on it?

17 MR. ANOLIK: Yes, your Honor.

18 THE COURT: You will not have to make your
19 motion in front of the jury.20 MR. ANOLIK: No, no. I would never do
21 that. I am merely trying to proselytize your Honor
22 to my point of view. Of course, you have granted
23 me an exception and I will just go on to the next order
24 of business.

25 The stipulation that we are going to put

1 jha63 277

2 on the record, as I understand it, is that the name
3 Harold Roth -- I think it was put on already, your Honor.
4 Wasn't that put on already, that stipulation?

5 MR. WOHL: The fact that the defendant
6 signed --

7 MR. ANOLIK: Yes. I am almost posi-
8 tive that was put on.

9 THE COURT: Yes. It's just the fact that
10 Exhibits 1 and 2 were filed with the IRS on or about
11 the dates set forth therein and that the defendant
12 signed both of these exhibits.

13 MR. ANOLIK: Yes. Frankly, your Honor,
14 after discussing this matter thoroughly with my client,
15 with an associate counsel of mine, who is in court, I
16 have decided to rest at this time.

17 THE COURT: All right. Do you want the
18 other witness back?

19 MR. ANOLIK: I won't need him.

20 THE COURT: You won't need the witness, you
21 waive his return to the stand?

22 MR. ANOLIK: Yes, sir.

23 MR. WOHL: In that event, your Honor.

24 THE COURT: We will sum up and charge in
25 the morning.

1 jha69

2 nor have I instructed you as to the law. So don't
3 discuss it with anyone else.

4 I appreciated your promptness in being
5 here at 9:30 this morning and indicated that we were
6 all on board, and we were, and Mr. Quinones, our court
7 reporter, had gotten sick over the weekend and the word
8 hadn't gotten through to get a substitute reporter
9 down here. It is hard to make those last-minute
10 changes when all have been assigned to other courtrooms
11 and so forth. Hopefully we will all be intact and
12 be on hand tomorrow morning at 9:30.

13 Have a pleasant evening. I will see you
14 then.

15 (The jury left the courtroom.)

16 THE COURT: In connection with your re-
17 quests to charge, Mr. Anolik, item No. 1, I will not
18 charge in that language.

19 MR. ANOLIK: The substance?

20 THE COURT: This is a criminal case, the
21 burden of proof beyond a reasonable doubt of establishing
22 each and every element of the crime charged is upon the
23 government.

24 No. 2, burden of proof and presumption of
25 innocence, and No. 3, I will charge in my own language,

1 jha70

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2 but I will charge the substance of that.

Wilfully and knowingly, that is all part
of my charge.

No. 4, the charge will indicate that a defendant is charged with having wilfully and knowingly omitted to file material matters in connection with his return. To find the defendant Behrman guilty of the offense of wilfully subscribing to a false joint return you must find that the government established beyond a reasonable doubt each of the following four elements: that the defendant made and subscribed the tax return for the year in question, that the tax return for the year in question contained a written declaration that was made under penalty of perjury, that the return for the year in question was not true and correct in every material matter, and that in signing or subscribing the tax return the defendant acted wilfully, knowing that at the time the return was filed it was not true and correct as to every material matter, and to find the defendant guilty of the crime you must find that the government has proven beyond a reasonable doubt that in some material respect the return was false.

1 jha71

2 Internal Revenue Service have in order to estimate and
3 compute the tax correctly an item. An item is also
4 material if it could be reasonably expected -- wait a
5 minute. I am sorry.

6 This will be as follows: Information
7 is material within the meaning of this case when it is
8 of such a nature that it would be reasonably expected
9 that the taxpayer should report it and the Internal
10 Revenue Service have that information in order to esti-
11 mate and compute the tax correctly.

12 Any objection to that?

13 MR. ANOLIK: Yes, I object to it, your
14 Honor. I most respectfully ask your Honor to tell the
15 jury that they must find that the defendant had an
16 obligation to report this income and that the government
17 must prove that it was taxable income.

18 THE COURT: What do you say, Mr. Wohl?

19 MR. WOHL: First of all, I think that the
20 charge that your Honor read was correct, but I think
21 that we are getting into an area here where it may --
22 since what we have is the defense resting rather than
23 putting on a specific defense, I am wondering whether
24 it might be necessary to have the kind of a charge that
25 tells the jury what income is. For example, gambling

1 jha72

2 winnings, as I understand it, are taxable.

3 In addition, I believe it was the Lacob case
4 referred to the court's instructions on this presumption
5 that when the government shows receipts that there is
6 a burden if the defendant wants to claim it is not in-
7 come, the defendant has the burden of explaining it is
8 not income. I have not been able to find any cases
9 really honing in on specifically what type of jury instruc-
10 tion is proper under those circumstances. I spent
11 a good bit of time over the weekend looking for one
12 and I just couldn't find any that specifically referred
13 to it, except this Lacob case, which just said a
14 passing remark, something along the lines of the
15 court's instructions on the issue were correct, refer-
16 ring to this burden of proof or burden of explanation
17 concept.

18 But it certainly seems to me that the law
19 is that once the government has shown the defendant
20 receiving money under circumstances which give it the
21 appearance of income that the jury is entitled to find
22 that that is income, and I think that it would be mis-
23 leading to give the jury an instruction that tends to
24 suggest that it is the government's obligation to
25 prove all of the circumstances of the defendant's activities

1 jha73

2 that would make that income, because it seems to me
3 that that is not what the law is.

4 MR. ANOLIK: Your Honor, I might point
5 out -- you know, I am a former prosecutor myself, your
6 Honor, and I have done a lot of work on appeal. I
7 know the government goes to tremendous pains to figure
8 out net worth theories, understatement theories, inter-
9 viewing hundreds, sometimes, of debtors and other people
10 who deal with taxpayers, to try to make sure when they
11 go to court on a tax case that they can establish tax-
12 able income, be it on a net work theory or an under-
13 statement theory. But to merely say that they are
14 going to show moneys going through an account and on
15 the basis say it raises a presumption that it is taxable
16 income without more in my opinion is unconstitutional
17 and I don't think it is the law, your Honor. I submit,
18 your Honor, that it is a jury question for the jury to
19 determine whether or not the government has satisfied
20 them beyond a reasonable doubt that taxable reportable
21 income was received by this taxpayer. Otherwise,
22 your Honor, they could get indictments by the dozens,
23 hundreds.

24 MR. WOHL: I would like to make it clear,
25 your Honor, that at this point I am not saying there should

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2 be such an instruction. I am just saying that I want
3 to spend more time in addition to what I already spent
4 looking into it. I did look into it over the weekend,
5 but on the other hand, it seemed to me that it probably
6 wasn't going to arise in this case because we had a
7 taxpayer who was going to get on the witness stand and
8 give a particular explanation. So we weren't going
9 to be faced with a case where you have money in gross
10 receipts going to a taxpayer and then there is just no
11 explanation, sort of along the lines of a receipt of
12 recent possession of stolen goods or that sort of thing.
13 But I do think it is something that bears some looking
14 into, which I intend to do.

15 THE COURT: I know it bears looking into.
16 You certainly should have enlightened me before you
17 started. I had no memorandum of law from anybody
18 as to what was involved here. That doesn't shift the
19 burden of the court coming up with the right answer,
20 regardless of whether you supplied them to me, which
21 burden always remains upon the trial court. I don't
22 know how I can charge them in connection with the state-
23 ment in Siravo that the burden shifted to the taxpayer
24 because the burden in a criminal case is never upon a
25 defendant to produce any evidence. So I certainly

1 jha75

2 can't charge them that way. I can note that is the
3 law as a matter of passing upon a motion to dismiss,
4 but I don't know that I can charge a jury that. I
5 don't think I can.

6 MR. WOHL: I think it might well be an
7 analogous situation to a possession of recently stolen
8 property, and in that circumstance I think if the charge
9 runs along the lines of that you may but need not
10 infer from the fact that the defendant possessed the
11 property recently after it was stolen that his possession
12 was guilty possession unless there or an explanation,
13 or something along that line.

14 In other words, I guess what I am saying
15 is that the criminal law is not totally devoid of pre-
16 sumptions that run into favor of the government. That's
17 the only one I seem to be able to think of right offhand.
18 There is a way to tell the jury about it, stopping short
19 of giving them the impression that they are legally
20 bound to come up with a particular result. But I
21 think they have to be apprised of the fact that they
22 are entitled to find that this was income without the
23 government proving all of the deductions and solutions
24 and all of that sort of thing that the defendant may have
25 had.

1 jha76

2 THE COURT: Siravo seems to indicate that
3 you can do that, because they had an opinion in a
4 gambling case which I think they pretty much reversed
5 in the Siravo case.

6 MR. ANALIK: I think they distinguished it,
7 your Honor, rather than reversed it.

8 THE COURT: It says:

9 "Our analysis is not shaken by consideration
10 of our opinion in Winkler, 230 F.2d 766. The only
11 issue expressly addressed in that case was a definition
12 of gross income with respect to a professional gambler.
13 Neither party believed the question of allocating the
14 burden of producing evidence as to losses. To be
15 sure, our action in reversing the conviction rather than
16 remanding for trial under proper instructions may be
17 read as assuming that the government was bound to
18 show the amount of offsetting losses. Having now
19 faced the issue frontally, we are persuaded of the sound-
20 ness of our present position and must reject any impli-
21 cation stemming from this sub silentio assumption."

22 MR. ANALIK: Later on they go along and
23 say what the general rule is in evasion cases, and I
24 think they included fraud cases, your Honor, and they
25 clearly spell out what I always thought the general rule

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2 to be, that they must show taxable income.

3 May I address myself to Mr. Wohl's analogy
4 to the recently stolen property. In those cases,
5 your Honor, property which can be the subject of that
6 presumption is property where evidence is introduced
7 that it has clearly been stolen from someone, that the
8 party establishes it actually was stolen property,
9 which is analogous that they must first establish
10 that it was income received, income, not merely money
11 going into an account. But it is not even a good
12 analogy, for this reason: In these cases they have
13 to show that the property was recently stolen, that this
14 party had exclusive, unexplained possession of that
15 property, and that he had the property either in his
16 possession or under his direct control, your Honor,
17 because there is no doubt that he had a legal right to
18 the money here. No one says he stole the money in
19 this case at all, your Honor. If this were a question
20 of stolen money it would be something else. The theory
21 here is that the government has never claimed he was not
22 entitled to the money he received. They say that it
23 was income which he should have reported and by pleading
24 not guilty he has denied that. So you can't now say,
25 "Because you pleaded not guilty, and I am not going to

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1 jha73

2 introduce evidence that it was not income, then you
3 are bound by the fact that it is income." You might
4 as well have an inquest, not a trial, because that is
5 what it would be, your Honor.

6 THE COURT: I am glad you really enlighten
7 me on all of the legal problems involved without giving
8 me any citations to authoritative cases or charges
9 that have been upheld in previous cases.

10 MR. ANOLIK: We may come up with some.
11 I will tell you this, your Honor, that it was because
12 of the nature of the evidence adduced -- frankly, I
13 have been involved either on appeal or at trial in a
14 number of tax cases, your Honor, and this is the first
15 case, and I don't say it critically, but this is the
16 first case where there has not been an attempt to
17 show a style of living, a net worth or an understate-
18 ment of known income. Those are the theories upon
19 which, your Honor, I have ordinarily, at least in my
20 experience -- Mr. Wohl probably has a great deal more
21 experience than I have in these matters -- that is the
22 contact that I have had in tax cases, your Honor.

23 THE COURT: What about the failure to
24 properly enter returns that would have been called for
25 by the operation of his business.

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2 MR. ANOLIK: That is not charged here.

3 THE COURT: I know it is not charged
4 here. Maybe it is.

5 MR. WOHL: No, it is not charged.

6 THE COURT: It is charged in here within
7 the indictment that the reported adjusted gross income
8 did not include substantial amounts received by him
9 during that year from customers who purchased merchandise
10 from him. That is what the charge is.11 MR. ANOLIK: Yes, not specifying what
12 amounts. I don't think I addressed this to Mr. Wohl,
13 but I did talk to Mr. Walton, and he says that
14 they are not required to prove any amount in a fraud
15 case, he said, because they are not asking the jury to
16 find an amount in a fraud case, he said, because they
17 are not asking the jury to find an amount. But my
18 understanding was, your Honor, they had to at least show
19 it was taxable income, but they want to get out of
20 that too. I don't think they have met their burden,
21 your Honor, if they can get out of both aspects.22 THE COURT: If you can come up with any-
23 thing either tonight or tomorrow morning before we reassemble
24 I would appreciate your informing me promptly.

25 MR. ANOLIK: What time, your Honor? Your

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2 Honor didn't go over the government's requests, by the
3 way.

4 THE COURT: There is no error if I fail
5 to charge --

6 MR. ANOLIK: There is one request I object
7 to, your Honor.

8 THE COURT: I have some objections to some
9 of their requests too.

10 Request No. 3, I am just going to charge
11 the first sentence of subdivision, the first sentence in
12 subdivision 2. I am not going to charge the rest of
13 it. I will charge all of subdivision 3 and 4.

14 Request No. 4 is where we have the diffi-
15 culty.

16 MR. ANOLIK: That's right.

17 THE COURT: I don't know yet what I am
18 going to charge with respect to that.

19 MR. ANOLIK: Your Honor, I might point
20 out in page 2 of that request No. 4 the government, in
21 the last sentence, says that "I charge you that failure to
22 report a substantial amount of income" -- I interpret
23 income to have a technical term, your Honor.

24 THE COURT: You think it should be
25 taxable income?

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(In the robing room.)

3 THE COURT: I am making available to you, and I
4 have just one additional charge coming down, what I expect to
5 charge. You may look at it so that you will know ahead of
6 time how I am going to charge and this will constitute my
7 rulings in connection with the requests to charge.

8 The only additional part that I am going to put
9 in here is the definition of suggested gross income with the
10 statement that the jury may infer from the receipt of income,
11 but need not infer that he had adjusted gross income. The
12 burden however is upon the government in all cases to
13 establish beyond a reasonable doubt that the expenses
14 incurred in connection with the sales of the goods exceeded
15 his receipts.

16 MR. ANOLIK: Of course there is no evidence --

17 THE COURT: I know that.

18 MR. WOHL: I missed something here.

19 THE COURT: Why don't you go over this, gentlemen.
20 You will then know how I am going to charge this jury.

21 We are now on the elements of the offense, false
22 declaration. Element No. 1, the defendant made and subscribed
23 the tax returns for the year in question. Actually there is
24 a stipulation with respect to that so that that issue is no
25 longer before the jury. You did not stipulate if somebody

1 jarm 2

2 were called to testify as such established the very fact that
3 he signed.

4 Elements 1 and 2, that the defendant made and
5 signed the tax return for the year in question and that the
6 tax return contained the written declaration, containing the
7 perjury. Those elements have both been stipulated and I will
8 instruct the jury that that issue is no longer before them.

9 Is that satisfactory?

10 MR. ANOLIK: Yes, sir.

11 THE COURT: 3.

12 MR. ANOLIK: That is not stipulated to.

13 THE COURT: No.

14 MR. ANOLIK: There is no evidence -- I am talking
15 about the fellow in Texas, that Wagner purchased anything in
16 the way of goods from Harold Roth. There is evidence that
17 checks were given but you remember that he said that he was
18 doing business with Behrman on many fronts. In fact, he
19 even mentioned that. There is no evidence that the members
20 were part of the Harold Roth firms. There is a dearth of
21 evidence here and that is the motion I made, the motion to
22 dismiss and that is the reason I didn't put my man on the
23 stand. I felt they didn't come up with a prima facia case.

24 THE COURT: Wasn't there proof that these
25 receipts, these checks were paid against invoices that were

1 jerm 3

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2 submitted?

3 MR. ANOLIK: He said that he bought some goods
4 and he said -- this is my recollection, that he was dealing
5 with Behrman, that there came a time that Behrman said, "Give
6 me checks in the name of Harold Roth." We don't know that is
7 as against the books or whether it is a loan or what because
8 there is no evidence of that as to whether that was appertain-
9 able to a particular invoice. That is the point.

10 MR. WOHL: I think that is completely wrong. I
11 think the evidence was very clear that the defendant went to
12 this Wagner-Nelson Company, said, I am selling goods, I am
13 selling the name of various different companies, and he sold
14 them large amounts of goods and told them or told -- that is,
15 the defendant sold the goods and told Wagner-Nelson, Mr.
16 Wagner, to make payments to Harold Roth.

17 THE COURT: That is what I understood the
18 testimony to be.

19 MR. WOHL: I think there was even testimony
20 concerning shipments of goods and where they were shipped from
21 and that sort of thing.

22 THE COURT: You see my charge as to the third and
23 fourth elements and then I am charging as the Court charged
24 in 484 Fed Supp. 670, page 674 and 675. That takes the place
25 of my original charge on knowing and wilfully because I think

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2 it is better put here.

3 MR. ANOLIK: I am wondering if we could -- I should
4 ask, at this point, you to charge that they should draw no
5 inference by virtue of the fact that the defendant did not
6 take the stand.

7 THE COURT: It is right there.

8 That is the way I am going to charge except I have
9 one additional item with respect to adjusted gross income.

10 MR. WOHL: I didn't quite understand that instruc-
11 tion, your Honor.

12 THE COURT: We better wait until it comes down.

13 It is being tied up.

14 MR. ANOLIK: Have we decided on the order of
15 summation? I would desire to sum up last. I think in a case
16 where the defendant has not taken the stand it might be more
17 consistent with the new rules to permit me to sum up last.

18 MR. WOHL: It is up to your Honor as far as I am
19 concerned.

20 THE COURT: If you have no strong feeling about
21 it and having geared your summation to the fact that you might
22 have been going last, Mr. Wohl, I will have you sum up first.

23 MR. WOHL: Can I have a few minutes to sort of
24 adjust things?

25 THE COURT: All right.

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2 MR. WOHL: There is one thing, your Honor, that
3 I wanted to clear up and that was, your Honor seemed to say
4 that you were instructing on the basis of an impression that
5 there was no evidence of receipts.

6 THE COURT: There is no evidence of the cost of the
7 goods that were sold, expenses.

8 MR. WOHL: I think the law is extremely clear that
9 the government does not have an obligation to prove any cost
10 of goods sold. That is something within the knowledge of the
11 defendant and that is where this burden of coming forward
12 goes to the defendant. I am prepared, because I was not able
13 to find anything, I am prepared to accept the idea that
14 perhaps the jury should not be instructed in the language of
15 some of the opinions that clearly say that that is the burden
16 of the defendant but I strenuously object to any instruction
17 suggesting in any way that there is any cost of goods sold
18 in this case because there has been not a single whit of
19 evidence to suggest that this defendant had any cost of those
20 goods at all. That would be something arising close to a
21 defendant.

22 I hasten to point out that it would not be a
23 defense in this case because even if there were costs of goods
24 sold he would have to report the gross income, his gross
25 receipts and then he would have to file that return for

1 iqrm 6

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2 operating a business that requires him then to deduct from
3 that the cost of goods sold. I think it would in effect be
4 instructing on a defense that has never been raised.

5 MR. ANOLIK: May I pose a question to Mr. Wohl
6 through your Honor. Would it be the government's position
7 that if a business ran at a loss that a tax return has to be
8 filed anyway? I realize --

9 MR. WOHL: Let's put it this way, I think -- I
10 don't happen to know the answer to that question right
11 offhand.

12 MR. ANOLIK: I think I do, your Honor.

13 MR. WOHL: I would say, however, that the jury
14 shouldn't be instructed on defenses as to which there has
15 not been any proof. If there were a case like that, it
16 seems to me the jury shouldn't be told this when there is
17 no proof of it.

18 MR. ANOLIK: The point is this, Judge: If there
19 is no evidence of cost of goods sold then there is no
20 evidence of income because that could only be relevant if
21 there are goods involved so I think Mr. Wohl's argument is
22 self-defeating, with all respect to Mr. Wohl.

23 THE COURT: I have a great deal of difficulty
24 with his case.

25 MR. ANOLIK: He inherits this case from another

1 jgrm 7

2 assistant, your Honor.

3 THE COURT: The Siravo case, the count which we
4 discussed yesterday charged or was the fourth count which
5 was not 7206 which is what we have here in our case, but
6 the fourth count charges the defendant having reached the
7 income of \$73,000 failed to file a return. The Court
8 instructed the jury and was held properly by the Court of
9 Appeals that total receipts must be reduced by the total
10 cost of goods sold and other cost represented by other
11 capital to arrive at gross income, and even if the government
12 did not prove the exact amount of income it would be
13 sufficient if the evidence showed that receipts exceeded
14 costs of goods sold by at least \$600. That has not been
15 done here.

16 MR. WOHL: I can see a difference between a case
17 where the man does not file a tax return and a case where
18 somebody does file a tax return. When you don't file a tax
19 return the law does not require you to tell your gross
20 income and give your exemptions and exclusions and deductions
21 and all that. Rather, the law seems to say that if you have
22 done the computations and you come up with a result that
23 gives you so little income that you don't have to file, you
24 don't have to file and you don't tell us all that informa-
25 tion.

1 iqrm 8

2 On the other hand, if you do file then the law
3 seems to be very clear, and I think our supplemental
4 instruction which just comes right out of the statute, makes
5 it clear that you have to report everything. You report
6 all income from whatever source derived. But income is
7 defined so broadly in the statute, it includes anything. In
8 fact gross income from business, all income.

9 THE COURT: You are not charging gross income.
10 You are charging him in the indictment with failing to
11 include substantial amounts of money in his adjusted gross
12 income. That is the way the indictment reads.

13 MR. WOHL: I know.

14 THE COURT: It does not charge him with failure
15 to report gross income, it charges him with failure to
16 include in his adjusted gross substantial amounts of money
17 received. That is what the indictment says.

18 MR. WOHL: I appreciate that.

19 MR. ANOLIK: In fact --

20 MR. WOHL: I wish you would not interrupt.

21 It seems to me, however, your Honor, that it is
22 clear from reading the tax return and from reading the
23 statute that the way one reports adjusted gross income is by
24 including certain things in gross income and then making
25 adjustments to arrive at the adjusted gross income.

1 jqrn 9

2 Therefore, by not including items in gross income one is
3 automatically not including them in adjusted gross income
4 either.

5 It seems to me it would be severely improperly
6 prejudicial to the government's case to give the jury any
7 impression that it is a proper way for a taxpayer to behave
8 to, instead of doing what he is supposed to do, i.e.,
9 include everything in gross income and then make his
10 adjustments to arrive at adjusted gross income, to take it
11 upon himself to say, well, I figured things out and I have
12 some adjustments here so I am not going to tell them about
13 that and I will put in a lower figure in gross income and
14 not include the adjustments that I have used to get to that
15 figure. I don't think the jury should be told that that
16 is a proper way to operate.

17 MR. ANOLIK: I don't think he has proved that is
18 income. We had a lot of testimony from Gilman particularly
19 that there were repayments of loans back and forth. There
20 was almost no testimony from Gilman as to purchases. In
21 fact, Gilman indicated that his business went lousy and he
22 took him on as an employee in 1968. In other words, Gilman
23 specifically admitted that his business was bad, namely the
24 defendant's business was bad, and he said, "I hired him as
25 my general manager. Both our businesses were not doing well."

1 iqrm 10

2 Where is the evidence? First of all, we don't
3 know whether the monies paid were income because Mr. Wohl
4 on the one hand says there is no evidence of cost of goods
5 sold. Well, how can you have income if there was no
6 evidence appertainable to a business? We don't know it is
7 a business. All we know it is money going through an
8 account, period. It could be loans or anything.

9 MR. WOHL: It is irrelevant. If these were
10 stolen goods it is totally irrelevant to this case.

11 THE COURT: The question is, the government has
12 the burden of proving that he failed to include in his
13 adjusted gross income substantial amounts of money that were
14 in fact income to him.

15 MR. WOHL: We submit that we do that by proving
16 that he failed to include it in gross income and the law
17 presumes that if somebody has deductions that are going to
18 credit him on his tax that he is going to come forward
19 with those.

20 THE COURT: The only thing I can see in that
21 connection, Mr. Wohl, is a statement from the Siravo case.
22 It says a return that omits material items necessary to the
23 computation of income is not true and correct within the
24 meaning of Section 7206.

25 MR. WOHL: Yes, sir.

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2 MR. ANOLIK: The point is you have to prove that
3 is necessary first.

4 MR. WOHL: I think the law is clear that the
5 distinction between a 7203 case such as we have here and the
6 7201 case is that in this case the government does not even
7 have to prove any tax consequences at all. By ruling that
8 the government has to go into cost of goods sold in this
9 type of case, it seems to me what you are in effect saying
10 is that this case has got to be exactly the same thing as
11 an evasion case because we have to show in effect tax
12 evasion.

13 THE COURT: It is not an evasion case, it is a
14 failure to state a material fact.

15 MR. ANOLIK: Yesterday I thought Mr. Wohl was
16 relying on Siravo. I pointed out in my argument that as I
17 understood it no return was filed. I think your Honor has
18 agreed that that in fact was the case there. Therefore,
19 I don't think the Siravo case is applicable to this case in
20 that sense. It seems to me, your Honor, that Mr. Wohl
21 through no fault of his own, your Honor, is faced with a
22 situation where the agencies that supply information to the
23 government have really not given him enough to work with.
24 In other words, I just don't feel that they had enough
25 investigatory -- or else they didn't produce it, one of the

1 jqrn 12

2 two -- material to determine whether or not in fact there
3 was any violation of the tax laws because it just seems
4 incredible to me, your Honor, that they would come in and
5 say because money passed through an account that that is
6 income. What if he received an inheritance, what if he
7 received money from some loan, that is not automatically
8 income. In fact, Gilman admits there were substantial
9 amounts of money exchanged as loans.

10 MR. WOHL: Your Honor, I think it is important to
11 recognize that this argument that Mr. Anolik is making is
12 clearly contradictory to the evidence. Mr. Gilman on cross
13 examination talked about loans. On direct examination he
14 said that this Harold Roth money was payment for goods that
15 Mr. Behrman told him he bought in a closeout and he was
16 giving him a good deal on the goods.

17 THE COURT: Take a look at this.

18 MR. WOHL: It seems to me the evidence is clear
19 beyond any doubt that he got the money by earning it in his
20 business and I am really struck by the fact that people are
21 saying that there are problems with this case. This is the
22 strongest Internal Revenue case I think anybody is ever
23 going to see because, what Mr. Anolik is confused about is,
24 that he is talking about just the receipt of money does not
25 prove income. But what you have here is you have both a

2 bank deposits case and a specific items case rolled into one.

3 The government would be in this courtroom and
4 entitled to go to the jury even if we didn't have any
5 evidence whatever from Mr. Wagner or from Mr. Gilman as to
6 how the defendant got this money. We come in on a bank
7 deposits case and we would be entitled on an instruction to
8 the jury that the fact that this money went into that bank
9 and there was an increase in the bank deposits and then we
10 have to prove or rule out savings account, inheritances,
11 and so on, and gift tax and that sort of thing which we do
12 with an intent, just rule them out, not have any evidence
13 as to how we got it, we would be entitled to an instruction
14 that the jury could infer from that that that was income.

15 In this case we not only have the bank deposits,
16 vast amounts of money in comparison with the rest of the
17 money this defendant had, even a little bit of evidence of
18 expenditures and gambling far beyond his means, but beyond
19 that we have direct evidence of how he got the money.

20 So, it is like a case that the only thing that is
21 peculiar about it is the enormous amount of proof and I
22 really think that to really search beyond the evidence and
23 suggest to the jury that the government has to prove a lack
24 of expenditures --

25 THE COURT: Take a look at this.

2 MR. ANOLIK: Frankly, Judge, I have to disagree
3 with Mr. Wohl because in my opinion this is one of the weak-
4 est federal cases I have ever seen.

5 THE COURT: You have seen I have had difficulty
6 with it. What I am giving you now is with respect to the
7 third element.

8 MR. WOHL: I don't think this is law and I can
9 see how it might be so on a failure to file case where the
10 question is whether the taxpayer had to file. But where he
11 files it seems to me the law is clear that he has to report
12 gross income regardless of what these reductions are in
13 the gross income to arrive at adjusted gross income. It is
14 not an acceptable method of reporting to just decide, well,
15 I have got lots of deductions so I am not going to report it.
16 That is just not the law so far as I know.

17 I think that one or two of those cases that I
18 cited yesterday that start with the Bender case in the
19 Seventh Circuit basically support the proposition that
20 these types of items, expenditures by the defendant, are
21 something that, A, are peculiarly within the defense's
22 knowledge and not within the government's knowledge; B, are
23 something that ordinarily benefit the defendant in giving
24 him tax consequences that are favorable to him; and C,
25 therefore need not be proved by the government.

2 THE COURT: Except this: Isn't it possible for
3 you to have to go to the suppliers, to have taken the
4 invoices that were received and found out what the normal
5 cost of those were?

6 MR. WOHL: No. So far as we know he didn't buy
7 the goods. They had a fire, quote, unquote.

8 THE COURT: That is something we can't --

9 MR. WOHL: The point is --

10 THE COURT: Couldn't you have brought in an expert
11 to say that the cost of those goods would have been so much?

12 MR. ANOLIK: There are no invoices.

13 THE COURT: Isn't the obligation to show --

14 MR. WOHL: I don't think it is our obligation.

15 THE COURT: The other item I have difficulty
16 with is intent. mere failure of statement of income is not
17 intent --

18 MR. WOHL: Deliberate understatement --

19 THE COURT: We have nothing here in connection
20 with intent.

21 MR. WOHL: Yes, use of a false name.

22 MR. ANOLIK: I don't know it is a false name.

23 There was no evidence it is a false name because of the fact
24 that he didn't steal the money.

25 THE COURT: I had no requests with respect to a

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2 false name.

3 MR. WOHL: I know. I just thought of that this
4 morning.

5 THE COURT: I looked through all of my charges
6 to see if I had one.

7 MR. WOHL: I thought about that this morning and
8 I should have requested it but I didn't.

9 THE COURT: I looked over the book forms. It is
10 not listed in Black and Devitt under alias or false name.
11 I had it and I can't find it. This is going to go in on the
12 third element. I have had difficulty with the case, Mr.
13 Wohl. What I am going to do is let it go to the jury on
14 this charge and what I am going to do with it when the
15 jury returns I don't know.

16 MR. WOHL: I think that this charge is highly
17 prejudicial to the government.

18 MR. ANOLIK: It is prejudicial to us --

19 THE COURT: If both sides disagree, then it must
20 be correct. Unless one side says they disagree with it
21 because --

22 MR. WOHL: I don't see how it is consistent with
23 the cases that hold that the defendant is the one that has
24 the burden of coming forward with deductions and exclusions
25 and that would be --

1 iqrm 17

2 THE COURT: Let me assume this. Assume that he
3 had receipts of \$10,000 and the cost of the goods cost him
4 \$10,000 and he deliberately does not put it in there, is
5 this a violation of 7206?

6 MR. ANOLIK: I don't think so. I can't see that.

7 MR. WOHL: That is one of the reasons why -- that
8 is one of the big distinctions between 7206 and 7201. 7201
9 you have to show he was out to evade his taxes. 7206 you
10 don't have to show that. One of the frequent defenses in a
11 7201 case and one of the reasons why 7206 is used is that in
12 a 7201 case you show 10,000, \$100,000 of extra income. The
13 defendant then comes in and says -- he does not get an
14 instruction without saying it but maybe he comes in and says,
15 wait a minute, I had \$1 million worth of deductions that I
16 didn't put on my tax return and that, as I understand the
17 law, can help him out in a tax evasion case but as I under-
18 stand it does him no good whatever in a false return case
19 because the government is entitled to know everything that
20 not only would affect his tax liability but would also help
21 the Internal Revenue Service in auditing that return.

22 The law does not allow a defendant to make false
23 statements on a tax return on the theory that in the back
24 of his mind everything is going to come out all right. That
25 is what I understand the 7206 law to be.

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2 MR. ANOLIK: Let's assume for the sake of argument
3 that I agree with him, which I don't. Taking this arguendo,
4 your Honor, they would have to show that when he has an
5 interview with this new accountant he hires and he says, I
6 want to know what income you received, and he figures
7 naturally to himself, well, all right, I made income here
8 and he tells him \$20,000 income, he does not even consider
9 this because it ran at a loss. Mr. Wohl says he should
10 have considered it. Fine, that is the purpose of a civil
11 audit but not for the purpose of inferring criminal intent,
12 wilfulness and knowledge which you need in a fraud case.

13 THE COURT: Civil --

14 MR. ANOLIK: There is no evidence here even of
15 an audit. We are allowed to comment on the lack of evidence
16 or the evidence. There is no evidence in this case of an
17 audit.

18 MR. WOHL: I think we would've been prevented
19 from showing contact with this taxpayer by the Fifth
20 Amendment. I certainly think it would be improper argument
21 for the defense to say there is nothing about an audit. I
22 would have been delighted to put in this taxpayer's
23 responses to the overtures by the government that he explain
24 why he was masquerading as Harold Roth.

25 MR. ANOLIK: He could have put it in.

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2 MR. WOHL: He didn't.

3 MR. ANOLIK: That is not my fault. He would have
4 a perfect right to put it in, your Honor. Unless he
5 claimed the Fifth Amendment at that time there is no basis
6 for not putting that in. In fact, there are cases saying
7 you can put that in, if there were false exculpatory reasons.

8 MR. WOHL: He just says I don't want to say
9 anything, just contact my lawyer.

10 MR. ANOLIK: He told me he discussed this with
11 Bregner for a year.

12 MR. WOHL: I think it would be improper for the
13 defense to -- we are getting off to another point but it
14 would be improper for the defense to argue that there is no
15 evidence of an audit because, A, I think you are getting
16 into an area where obviously the government has a lot of
17 problems in putting that kind of thing in when a taxpayer
18 says, "Go talk to my lawyer," and, secondly, there would
19 not be anything that the government -- it is not part of the
20 government's obligation to put in the fact that the taxpayer
21 was audited. If the taxpayer wants to put in the fact that
22 he was audited he can.

23 THE COURT: You would think I would be correct
24 in stating to the jury that a return that omits material
25 items necessary to the computation of income is not true and

1 jqrn 19

2 correct within the meaning of Section 7206 and if the jury
3 finds that the failure to include the receipts from here may
4 or may not be a material item as determined by them?

5 MR. WOHL: That is right.

6 MR. ANOLIK: I don't think so, your Honor. We
7 are assuming it is income. I don't think we have a right to
8 assume it is income.

9 THE COURT: Necessary to the computation of
10 income.

11 MR. WOHL: That is right.

12 MR. ANOLIK: If it is loans or something else
13 it is not income. It is not reportable.

14 MR. WOHL: There isn't any evidence --

15 MR. ANOLIK: There is no evidence either way.

16 MR. WOHL: That is where I disagree. It is
17 unfortunate we didn't get daily copy but from the testimony
18 of Gilman and Wagner they weren't loaning this money or
19 paying gambling money. They were giving it to him because
20 he was selling artificial flowers. They were giving it in
21 response to particular invoices and bills he paid. There was
22 even testimony from Wagner about how Behrman was on the phone
23 saying he was getting pressured by the company to collect
24 the money. He was not being pressured by Caesar's Palace
25 or the Desert Inn.

1 jarm 20

2 MR. ANOLIK: If they are selling flowers through
3 United Flowers and he says, make the check out to Harold
4 Roth, that is income to United Flowers. That is not income
5 to Harold Roth or anybody else.

6 MR. WOHL: Then he is stealing the money from
7 United Flowers.

8 MR. ANOLIK: There is no evidence he is stealing.

9 MR. WOHL: You can make all the arguments you want
10 but you don't know. All I am objecting to is any suggestion
11 that tends to suggest a defense was put in. If the defense
12 had its man on the stand saying, I borrowed the money, or I
13 found it in the street, or I came home one day and I found
14 my home was full of artificial flowers, that would be one
15 thing but they didn't.

16 THE COURT: Let's get this sharply presented in
17 case there is a conviction. The government has presented
18 evidence that Behrman received checks. I will strike that
19 out.

20 MR. WOHL: That is right.

21 MR. ANOLIK: I think that should stay in because
22 there is no evidence.

23 THE COURT: I will define adjusted gross income
24 as set forth here.

25 MR. ANOLIK: I think this is improper, your Honor.

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2 THE COURT: No, this is the statement of what the
3 adjusted gross income is.

4 MR. ANOLIK: You are not charging this part here?

5 THE COURT: No, just adjusted gross income.

6 MR. ANOLIK: All right.

7 THE COURT: I will define adjusted gross income.

8 MR. ANOLIK: We should keep this in. They are
9 going to speculate that there is evidence of that.

10 THE COURT: I do it here.

11 MR. ANOLIK: How can you talk about adjusted
12 gross income if we don't tell the jury that they have to
13 consider what adjusted gross income is?

14 THE COURT: It is being told. Adjusted gross
15 income, etcetera. That is the deductions and expenses
16 which includes cost of goods sold, etcetera.

17 MR. ANOLIK: But there is a dispute on that --

18 THE COURT: The government has the burden of
19 proving each and every element --

20 MR. ANOLIK: Aren't you permitting him to
21 speculate here, your Honor, as to what it is?

22 MR. WOHL: They don't have to find what it is.

23 MR. ANOLIK: I would like --

24 THE COURT: I am not going to charge that the
25 burden shifts to the defendant and this is the only way they

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2 get around it that I can see, doing it this way.

3 MR. WOHL: I agree that the language about the
4 burden shifting should not be told to the jury.

5 THE COURT: That may be a legal proposition. That
6 would indicate that he should have gotten on the stand.

7 MR. WOHL: I am satisfied on that.

8 THE COURT: The government has the burden of
9 establishing each and every element of the crime. I have a
10 reservation as to whether they have done it but let the jury
11 do that. If they find one way I will have another problem
12 on that.

13 MR. ANOLIK: Can you put it in a sentence saying,
14 but it is for you to determine whether evidence of this has
15 been established? In other words, not to let them think
16 it is an assumption that it has been established.

17 THE COURT: They can infer from the fact that he
18 received it on my charge that he had adjusted gross income.
19 Nonetheless the burden always rests upon the government to
20 include each and every element --

21 MR. ANOLIK: I can comment on the fact --

22 THE COURT: You are entitled to comment whatever
23 you want. I am not foreclosing you from doing that.
24 Absolutely not. You can attack this, sure. I don't want
25 you to go in and give a legal summation now that you have

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2 seen my charge. But within reason you have to do it here
3 and you can say the judge is going to charge you and they can
4 infer, but the government has the burden of proving. What
5 have they proved? It is proper for you to comment on that.
6 I would expect you to. Wouldn't you, Mr. Wohl?

7 MR. WOHL: Yes. I also would like to just say
8 I think it is proper for the government to comment that if
9 Mr. Behrman, although he didn't have an obligation to put
10 proof in, if he wanted to put in proof as to who sold him
11 the goods --

12 THE COURT: You are on thin ice.

13 MR. WOHL: As long as I don't say anything that
14 suggests proof that the defendant would have had to produce
15 by getting on the stand if he is saying that somebody could
16 have come in here and say why I sold Irving Behrman those
17 goods for 300,000, I think the government is entitled to do
18 it.

19 MR. ANOLIK: I will interpose an objection if
20 you do it.

21 THE COURT: You are flirting with a comment that
22 I will properly say I am going to charge you in the law that
23 the defendant in a criminal case does not have to take the
24 stand or present any evidence. The burden rests on the
25 government.

2 MR. WOHL: I think, your Honor --

3 THE COURT: I know the difficulty you are having
4 here but we don't cure it by doing something that is wrong.

5 MR. WOHL: The Tramunti and Dieguardi case makes
6 it clear that I am entitled to do that. It is important
7 that by making a number of individual rulings that might
8 be correct in other cases we don't come down with a bottom
9 line here of giving the jury the impression that it is part
10 of the government's burden in this type of case of coming
11 in with proof of cost of goods sold where we know that as a
12 legal proposition that we don't want to tell the jury about,
13 because it is sort of inflammatory, we have gotten to the
14 point where a burden has shifted to the defense here. We
15 don't want to sort of bend over backwards and give the jury
16 the totally wrong impression.

17 THE COURT: I don't think you can do that by
18 stating that the defendant should have taken the stand or
19 inferred in any way that he should have taken the stand.

20 MR. WOHL: I certainly don't intend to do that.

21 THE COURT: You don't intend to do it. Despite
22 the fact you may comment on the absence of proof with respect
23 to certain things, you must make it clear that you never
24 say that the defendant should have gotten on the stand.

25 MR. WOHL: Absolutely.

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2 THE COURT: You are flirting and you know that and
3 you have to do it very carefully.

4 MR. WOHL: Right, but I don't think we are going
5 to have any problem in that regard.

6 THE COURT: I hope not. It is a difficult
7 enough case. Let's not put in something additionally. I
8 have a great deal of reservation about it. You are aware
9 of that. Maybe we will see what the jury does and one way
10 or the other I will have to resolve it.

11 MR. WOHL: If the jury is given the impression
12 that the government has an obligation to come along here and
13 prove the cost of these goods sold, it seems to me that it
14 is quite apparent that they would come out acquitting the
15 defendant and I think the reason for that is the same as
16 in all tax cases, this is something that the government can
17 never prove particularly where you are dealing with this
18 kind of defendant.

19 THE COURT: I am not completely satisfied that
20 the government could not have produced some proof either
21 by way of expert testimony or knowledge of the trade at that
22 time or at least by obtaining, if they existed --

23 MR. ANOLIK: The 3500 material contained that
24 from Mr. Stone. They said they checked the invoice in Hong
25 Kong and apparently the cost of these particular goods was

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2 \$100. Do you remember that little piece of 3500 material?

3 It was never brought out by Mr. Stone but the point is they
4 had the name of the supplier of Hong Kong from those checks.

5 THE COURT: There are ways of doing it. The
6 fact these are '68 and '69, I don't know when you started
7 the return, when you started looking into this but he is not
8 indicted until '75, five years after the return was filed,
9 five-and-a-half years after the return was filed -- I don't
10 expect to go out and thankfully pick up a return April
11 16 or 17 in the year in which it is filed. But the fact
12 that the proof is difficult to get does not mean that you
13 can sustain a conviction.

14 MR. WOHL: It seems to me we have to answer two
15 questions. No. 1, does the government have the burden of
16 making that kind of proof, and I think the law is clear that
17 the government does not and that is where the presumption
18 comes in and it is clear as to why the government does not
19 put in that kind of proof if the law says that the govern-
20 ment does not have to. In this particular case --

21 THE COURT: You slip over into the question of
22 intent if you do that. You can prove circumstantially
23 intent, some of these other cases indicate how it can be
24 done, but assume he had no gain, net income from his
25 business, and assume that he says, one, I had nothing coming

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2 from them, I don't have to report anything. That is not
3 wilful, knowing, intent to file a false statement.

4 MR. WOHL: Yes, it is. Intent required under
5 this statute, 72061 is not the specific intent to evade
6 taxes --

7 THE COURT: Intent to avoid a false return.

8 MR. WOHL: If he says, I am filing a false return
9 because I don't think I owe any taxes, that is not intent to
10 file a false return? Of course it is.

11 THE COURT: Take a look at your Slutsky case.
12 There are so many circumstances from it in which you can
13 infer intent.

14 MR. WOHL: Slutsky was an evasion case.

15 THE COURT: Even on that line it is the same
16 thing.

17 Let's get the jury in.

18 (In open court; jury present.)

19 THE COURT: Apologies are in order again. It was
20 necessary. We attempted to take up at this time prior to
21 your being here at 9:30 but it took longer than expected.
22 Without wasting more time we will have summations of counsel
23 which I have indicated to you are to be a review of the
24 evidence as the attorneys think the evidence came in, what
25 reasonable inferences they think you should draw from the

2 CHARGE OF THE COURT

3 THE COURT: You are about to enter upon your
4 final duty which is to decide the fact issues in this case.
5 As I told you in my instructions at the beginning of the
6 trial, your principal function during the taking of testimony
7 would be to listen carefully and observe each witness as he
8 has testified and it has been evidenced to me that you
9 have faithfully discharged that duty.

10 We now have reached the point of the case where
11 all the evidence has been presented and the closing arguments
12 of the lawyers have been made and shortly after I have
13 completed my explanations to you on the applicable law,
14 you will retire to deliberate upon your verdict. You are
15 to perform this final duty in an attitude of complete fair-
16 ness and impartiality. You are to appraise the evidence
17 calmly and deliberately and, as was familiarized by me at
18 the time of your selection as jurors, without bias or
19 prejudice with respect to either the government or the
20 defendant as parties to this controversy.

21 The fact that this prosecution is brought in the
22 name of the United States of America entitles it to no
23 greater consideration than that accorded to the defendant,
24 and by the same token, it is entitled to no less considera-
25 tion. All parties stand as equals before the bar of justice.

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2 Your final role is to pass upon and to decide
3 the fact issues in the case and you, the members of the
4 jury, are the sole and exclusive judges of the facts. You
5 pass upon the weight of the evidence. You determine the
6 credibility of the witness. You resolve such conflicts as
7 there may be in the testimony and you draw whatever reasonable
8 inferences are to be drawn from the facts as you have
9 determined them.

10 My function at this point is to instruct you on
11 the law and it is your duty to accept these instructions of
12 law and apply them to the facts as you determine the facts
13 to be. The logical result of that application will be
14 your verdict in this case.

15 With respect to any fact matter it is your
16 recollection and yours alone that governs at all times.
17 Nothing that counsel either for the government or for the
18 defendant may have said with respect to any matters in
19 evidence, that is to say, any factual matter, whether stated
20 in a question, in argument or in summation is to be
21 substituted for your own independent recollection and so,
22 too, anything that the Court may have said during the course
23 of the trial with respect to a fact matter or may say during
24 the course of these instructions is not to be taken in
25 substitution of your own independent recollection which

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2 governs at all times.

3 Before we consider the precise charges of the
4 indictment, I believe a number of preliminary observations
5 are in order. In determining the facts you should not be
6 influenced by rulings that the Court may have made during
7 the trial. These rulings dealt with matters of law and not
8 questions of fact.

9 Counsel for both sides had the right, not only
10 the right but, indeed, the duty to press whatever legal
11 objections they believe existed as to the admission of
12 evidence and the Court's rulings on objections made either
13 by the attorney for the government or the attorney for the
14 defendant are not to be considered by you.

15 Of course, as I told you at the outset, where I
16 have sustained an objection to a question you must not
17 speculate on what the witness would have said had he been
18 permitted to answer nor may you draw any inference from the
19 fact of the wording of the question or that it was asked.

20 Similarly, where testimony has been stricken it
21 is not evidence and you are bound to disregard it. However,
22 you must remember that in ruling on objections the Court
23 was deciding questions of law and not questions of fact which
24 are solely for the jury.

25 I recognize that it is possible that a judge can

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2 have a great deal of influence with the jury. If you think
3 you have gleaned some indication as to my opinion of the
4 case either from any questions that I may have asked or from
5 my expression or tone of voice, disregard it entirely. The
6 Court has no opinion as to the veracity or credibility of
7 the witnesses or the guilt or innocence of the defendant.
8 You are the judges of the facts and you are the sole judges
9 of the guilt or innocence of this defendant. I am merely,
10 a judge of the law.

11 The fact issues must be decided here solely and
12 only within the framework of the evidence and the principles
13 of law that apply and, finally, please do not single out any
14 one instruction of mine as stating the law alone. Take
15 them all into account after you have read them all.

16 Now, members of the jury, you are to consider
17 only the evidence in this case and that evidence consists
18 of the sworn testimony of the witnesses, the exhibits which
19 have been received in evidence, the facts which have been
20 stipulated, and the presumptions which I will tell you about
21 in these instructions such as the presumption of innocence.

22 But while you are only to consider the evidence
23 in the case you are not limited to the bold statements of
24 the witnesses. On the contrary, you are permitted to draw
25 from the facts which you find have been established such

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2 reasonable inferences as seemed justified to you in the
3 light of your own experience.

4 An inference is merely another word for a conclu-
5 sion which reason or common sense leads you to draw from
6 the facts that have been proved here.

7 In considering the evidence you must remember, as
8 I told you at the outset, that an indictment is only a
9 formal method of accusing a defendant of a crime charged
10 and in itself is not evidence against a defendant. No weight
11 is to be given to the fact that an indictment has been
12 returned against the defendant.

13 Generally speaking there are two types of
14 evidence from which a jury may properly find the truth as
15 to the facts of a case. One is direct evidence. That is
16 the testimony of an eye witness, somebody who saw or heard
17 something done or said. The other is indirect or circum-
18 stantial evidence which is the proof of a chain of circum-
19 stances pointing to the existence or non-existence of
20 certain facts.

21 Generally the law makes no distinction between
22 direct and circumstantial evidence but simply requires the
23 jury find the facts in accordance with all the evidence in
24 the case, both direct and circumstantial.

25 We have a common example in this court house that

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2 most of us judges use to illustrate the difference between
3 direct and circumstantial evidence. I want you to assume
4 that when you came in here this morning it was a nice,
5 bright, sunshiny day and that there were no clouds in the
6 sky. You would then know what the weather was like from
7 your personal observation. You saw it and it looked like
8 a nice, pleasant day.

9 I want you to assume further that we were in one
10 of those courtrooms that we have right off the front
11 entrance of the building, one of those air-conditioned
12 courtrooms with no outside windows and just the entrance
13 door for spectators to come in. Assume that under the con-
14 ditions that I have indicated to you before that it was a
15 bright, sunshiny day and no clouds in the sky when you came
16 in here and went to that courtroom and assume we have been
17 sitting there for about an hour, an hour and a half, a
18 spectator walks in through the door and his hair is dripping
19 wet, his clothes are a little damp, he is drying his face.

20 Assume about a minute or two later another
21 spectator comes in and he has a hat in his hand dripping
22 water and a few minutes later another spectator comes in
23 and he has an umbrella and a raincoat and they are both wet.
24 You can assume, even though you could not see outside and
25 it was sunny when you came in, after this hour and a half

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2 and seeing what you saw with the spectators coming in in
3 the condition they were, you can then assume that it was
4 raining outside. That would be a chain of circumstances
5 leading to the conclusion that a fact existed or didn't
6 exist, that it was no longer sunshiny.

7 As I said, the law makes no distinction between
8 direct and circumstantial evidence, and it only requires
9 that you find the facts in accordance with all the evidence
10 in the case.

11 I have mentioned presumption of innocence. The
12 defendant here has entered a plea of not guilty to the
13 charges of the indictment. Thus, the burden is upon the
14 government to prove guilt beyond a reasonable doubt. This
15 burden never shifts to a defendant for the law never imposes
16 upon a defendant in a criminal case the burden or duty of
17 calling any witnesses or producing any evidence. You will
18 recall that I told you that several times in connection
19 with the summations in here as well as at the outset of the
20 trial and I am telling you again. The law never imposes
21 upon a defendant in a criminal case the burden or duty of
22 calling any witnesses or producing any evidence.

23 The law presumes a defendant to be innocent of
24 crime. Thus, a defendant, although accused, begins the
25 trial with no evidence against him and the law permits

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2 nothing but legal evidence presented before you as jurors to
3 be considered in support of any charge against a defendant.
4 The presumption of innocence remains with the defendant
5 throughout the trial and your deliberations until such time
6 if ever that the jury is satisfied of guilt beyond a reason-
7 able doubt.

8 Thus, the presumption of innocence alone is
9 sufficient to acquit a defendant unless and until after
10 careful and impartial consideration of all the evidence
11 in the case you as jurors are unanimously convinced of the
12 defendant's guilt beyond a reasonable doubt.

13 I will define for you later on what reasonable
14 doubt is. Before I get to the specific charges of the
15 indictment and some further instructions I want to call to
16 your mind the witnesses and the order in which they appeared.

17 This has been a short trial but this review may
18 help you. I do not propose to go over the evidence or
19 comment on it. That has been done by counsel in their summa-
20 tions and is undoubtedly fresh in your minds.

21 The first witness we had was Mr. Herbert Kraus,
22 Certified Public Accountant for Mr. Behrman.

23 The second witness was Albert Pinto, the head
24 teller of the Bank of Tokyo.

25 The next witness was Mr. Curtis Wagner from

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2 Texas and he was followed on the stand by James C. White.

3 The next witness was Robert Stone and the final
4 witness for the government was Charles Gilman.

5 Following that we had a stipulation of counsel
6 with respect to the fact that the returns in question were
7 signed by the defendant.

8 With that the testimony concluded and we had
9 summations of counsel. So much for my preliminary instruc-
10 tions.

11 I am now turning to the specific charges alleged
12 in the indictment. The indictment contains two counts or
13 accusations. Each of these charges a separate crime or
14 offense and must be considered separately. Each count
15 charges the defendant with a violation of Title 26, United
16 States Code, Section 7206(1), and you do not have to remember
17 the section number but that provision provides as follows:

18 "Any person who wilfully makes and subscribes
19 any return, statement or other document which contains or
20 is verified by a written declaration that it is made under
21 the penalties of perjury and which he does not believe to
22 be true and correct as to every material matter is guilty
23 of a violation of the law."

24 Perhaps it would be helpful for me to reread the
25 section. "Any person who wilfully makes and subscribes any

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2 return, statement or other document which contains or is
3 verified by a written declaration that is made under the
4 penalties of perjury and which he does not believe to be
5 true and correct as to every material matter."

6 Count 1 of the indictment reads as follows:

7 "The grand jury charges on or about April 15,
8 1969 in the Southern District of New York Irving Behrman,
9 the defendant, unlawfully, wilfully and knowingly did make
10 and cause to be made and did subscribe his joint United
11 States individual income tax return Form 1040 filed with
12 the Internal Revenue Service for the calendar year 1968
13 which contained and was verified by a written declaration
14 that it was made under the penalties of perjury and which
15 he did not believe to be true and correct as to every
16 material matter in that said Form 1040 reported adjusted
17 gross income of \$15,594.68, whereas, as he then and there
18 well knew and believed the reported adjusted gross income
19 did not include substantial amounts received by him during
20 that year from customers who purchased merchandise from him."

21 The second count: "On or about April 14, 1970
22 in the Southern District of New York" etc., and I will get
23 down to where it says, "in that said Form 1040 reported
24 adjusted gross income of \$20,205, whereas, as he then and
25 there well knew and believed the reported adjusted gross

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2 income did not include substantial amounts received by him
3 during that year from customers who purchased merchandise
4 from him."

5 I referred to the Southern District of New York
6 there and the Southern District is for our purposes here,
7 and it includes other counties, but for our purposes here
8 includes the Borough of Manhattan.

9 In order to find the defendant guilty of the
10 offense of wilfully subscribing to a false joint return
11 under the section that I have on here you must find that the
12 government has established beyond a reasonable doubt each
13 of the following four elements, and with respect to the
14 first two there has been a stipulation with respect to that
15 but I will tell you anyway.

16 First, that the defendant made and subscribed a
17 tax return for the year in question. 2, that the tax return
18 for the year in question contained a written declaration
19 that it was made under penalty of perjury. Those are facts
20 on which there has been a stipulation and it was read into
21 the record.

22 3, that the return for the year in question was
23 not true and correct in every material matter and, 4, that
24 in signing or subscribing to the tax return in question the
25 defendant acted wilfully knowing at the time the return was

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2 not true and correct as to every material matter.

3 I will elaborate on what is required under the
4 government's burden of proof here as to the items 3 and 4.

5 As to the third and fourth elements the government
6 charges that in the years in question that the defendant
7 did not believe the return to be true and correct as to
8 every material matter in that the reported adjusted gross
9 income did not include substantial amounts received by him
10 during each of those years from customers who purchased
11 merchandise from him. This has to be proved by the government
12 beyond a reasonable doubt, namely, that the return was
13 false as to a material matter and that there was a knowing
14 and wilful filing of a document which contained a statement
15 which the maker did not believe to be true and correct.

16 With respect to materiality, in determining
17 whether a statement is material, the test is whether it has
18 a natural tendency to influence or was capable of influencing
19 the action of the government in making a determination
20 required to be made.

21 As to adjusted gross income, adjusted gross
22 income is defined in the law as all income from whatever
23 source derived including but not limited to compensation,
24 fees, commissions and similar items, gross income derived
25 from business, gains derived from dealing in property,

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2 interest, rents, royalties, dividends, gambling winnings
3 and many other types of income.

4 Adjusted gross income is gross income minus
5 various types of deductions and expenses such as the cost
6 of goods sold and all other necessary expenses which are
7 ordinary and necessary to carry on a trade or business in
8 which the taxpayer is engaged.

9 In this case the government has presented evidence
10 that Mr. Behrman received proceeds from checks made out to
11 him for substantial amounts of money in payment for goods
12 sold. You the jury are permitted, but you are not required,
13 to infer from the fact that Mr. Behrman received amounts
14 of money that were not reported on his tax return that he
15 had adjusted gross income that was not reported.

16 On the other hand, I must emphasize again that
17 the government has the burden of proving beyond a reasonable
18 doubt each and every element of the offense including the
19 fact that the amount of money received by the defendant
20 exceeded the amount of his allowable expenses. This burden
21 remains with the government throughout the case and the
22 defendant need not present any evidence whatsoever to
23 establish his innocence.

24 I have referred to the fact that this must be a
25 knowing and wilful filing of a return excluding necessary

1 jqrn 98

2 or material information. If you are not satisfied that the
3 government has established both of these propositions beyond
4 a reasonable doubt, that is, the fact that the statements
5 were false, known to be such, and containing a statement
6 which the maker did not believe to be true, if they failed
7 to establish either one, that is, that the return was false
8 as to the source of the income, that is, that the return
9 was false as to income, adjusted gross income and that the
10 defendant did not reasonably believe it to be true and
11 correct as to a material matter, as I have defined that
12 term for you, then you will find the defendant innocent,
13 that is, not guilty as charged.

14 I use the word false, for example, talking about
15 a false statement. False means a statement if untrue when
16 made and then known to be untrue by the person making it or
17 causing it to be made. In law false is something a little
18 bit more than just an inaccurate statement. It is an
19 inaccurate statement known to be inaccurate.

20 People make inaccurate statements accidentally.
21 That is not a false statement in law. That is just an
22 incorrect statement. An inaccurate statement. When you say
23 false you mean an inaccurate statement which the maker knows
24 is inaccurate.

25 I have talked about knowing and wilfully. You

1 jqrn 99

2 should know what those terms are about. They are just
3 about what you think they are.

4 Knowing and wilfully means that you are doing
5 something deliberately and not accidentally, not inadver-
6 tently, not mistakenly. The reason why we put this in the
7 law is so people will not be convicted for accidental,
8 inadvertent mistaken acts. They would be only convicted
9 for doing something knowingly and wilfully, deliberately,
10 intentionally with a purpose to do something which the law
11 forbids or failed to do something which the law requires.

12 That brings me to the question of intent. Under
13 our system of justice two things are required to make a
14 person guilty of violating the law. He has to do an act and
15 he has to do it with the requisite criminal intent.

16 Specific intent is what is talked about in cases of this
17 kind. As that term implies, specific intent means more than
18 just the intention to do an act. It means not only the
19 intention to do the act but to do the act knowingly and
20 knowing that it is an act which the law forbids purposely.
21 In other words, intending to violate the law.

22 So much for the four elements that I have
23 indicated to you that the government must prove beyond a
24 reasonable doubt before you may convict the defendant.

25 In connection with the preparation of this return

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2 there has been testimony in here that Mr. Behrman's tax
3 returns for the years in question were prepared by an
4 accountant. The taxpayer, of course, may delegate the
5 responsibility for the preparation of returns to a person
6 such as an accountant whom he has reason to believe is
7 competent to handle such matters. The mistakes of such a
8 person are not attributable to the taxpayer.

9 However, the taxpayer is required to give or to
10 make available accurate information to his tax preparer with
11 respect to his income for the tax years in question. The
12 defendant cannot blame or shift responsibility to the person
13 he retains if he deliberately withholds vital information
14 from that person.

15 If the defendant provided his tax preparer with
16 full information as to his income and the defendant then
17 adopted, signed and filed the returns prepared for him with-
18 out having reason to believe that they were not correct,
19 then you must find the defendant not guilty.

20 If, however, you find beyond a reasonable doubt
21 that the defendant wilfully and knowingly did not provide
22 full and complete information to his tax preparer or that
23 he knew the returns prepared by his tax preparer were not
24 correct, then you are not required to acquit the defendant
25 simply because he did not personally prepare his tax returns.

1 jqrn 101

2 With respect to knowledge and intent, that exists
3 in the mind. As we all realize it is not possible to open
4 up a man's head and see what goes on in his mind. The only
5 way that you have for arriving at a decision on these
6 questions is for you to take into consideration all of the
7 evidence and all the facts and circumstances shown by the
8 evidence and to determine from all such facts and circum-
9 stances whether the requisite state of mind was present at
10 the time in question. Direct proof is unnecessary.
11 Knowledge and intent may be inferred from all the surrounding
12 circumstances.

13 I indicated to you that I would come to the
14 definition of reasonable doubt. I have told you that a
15 defendant is presumed innocent and that the presumption of
16 innocence remains with the defendant unless and until you
17 jurors are unanimously convinced of guilt beyond a reasonable
18 doubt.

19 In describing the elements of the various offenses
20 charged in the indictment I told you that the government
21 must establish each of those elements by proof beyond a
22 reasonable doubt. You naturally ask what is a reasonable
23 doubt. The words almost define themselves. That there is a
24 doubt founded in reason and arising out of the evidence or
25 lack of evidence. It is a doubt which a reasonable person

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2 has after considering all the evidence.

3 A reasonable doubt is not a vague or speculative
4 or imaginary doubt. It is not caprice, whim or speculation.
5 It is not an excuse to avoid the performance of an unpleasant
6 duty. It is not sympathy for a defendant. A reasonable
7 doubt is a doubt which appeals to your own reason, your
8 common sense, your experience and your judgment. It is a
9 doubt which would cause a reasonable man or woman like
10 yourselves to hesitate to act in relation to your own
11 important private affairs.

12 Mere suspicion will not justify conviction.

13 Suspicion is not a substitute for evidence nor is it
14 sufficient to convict if you find that the circumstances
15 merely rendered an accused probably guilty.

16 On the other hand, it is not required that the
17 government must prove guilt beyond all possible doubt. But
18 the proof must be of such convincing character that you
19 would be willing to rely and act on it in the important
20 affairs of your own life.

21 In sum, a reasonable doubt exists whenever after
22 a fair and impartial consideration of all the evidence
23 before you you can candidly and honestly state that you do
24 not have an abiding conviction that the defendant is guilty
25 of the charge.

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2 I indicated to you at the beginning of this trial
3 that one of your most important functions would be to
4 determine the credibility of the witnesses who testified.
5 You as jurors are the sole judges of the credibility of the
6 witnesses. You and you alone must determine what weight
7 their testimony deserves.

8 In my instructions to you at the start of the
9 case I gave you some guidelines that I thought might be
10 helpful to you as you listened to the testimony. I am going
11 to repeat and expand upon those instructions.

12 You are to understand that you should not be
13 influenced by the mere number of witnesses called by anybody.
14 The weight of the evidence is not necessarily determined by
15 the number of witnesses testifying on either side. Rather,
16 you should consider all the facts and circumstances in
17 evidence to determine where the truth lies.

18 In assessing credibility you should carefully
19 scrutinize the testimony given, the circumstances under
20 which each witness has testified and every matter in evidence
21 which intends to indicate whether the witness is worthy of
22 belief. The degree of credibility to be given a witness
23 should be determined by his demeanor, his relationship to
24 the controversy and the parties, his bias or impartiality,
25 the reasonableness of his statements, the strength or

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2 weakness of his recollection viewed in the light of all
3 other testimony and the attendant circumstances in the case
4 and the extent to which, if at all, each witness is either
5 supported or contradicted by other evidence.

6 How did the witness impress you? Did his version
7 appear straight-forward and candid or did he try to hide
8 some of the facts? Is there a motive to testify falsely?

9 In passing upon the credibility of a witness you
10 take into account inconsistencies, contradictions as to
11 material matters in his own testimony or any conflict with
12 that of another witness and also any inconsistencies or
13 omissions in prior testimony or any prior statement of
14 material matters as to which he may have testified upon the
15 trial.

16 Inconsistencies or discrepancies in the testimony
17 of a witness or between the testimony of different witnesses
18 may or may not cause the jury to discredit such testimony.
19 Two or more persons witnessing an incident or a transaction
20 may see or hear it differently.

21 Innocent misrecollection like failure of recollec-
22 tion is not an uncommon experience. A witness may be
23 inaccurate, contradictory or untruthful in some respects and
24 yet be entirely credible in the essentials of his testimony.

25 In weighing the effect of a discrepancy consider

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2 whether it pertains to an important matter or an unimportant
3 detail and whether the discrepancy results from innocent
4 error or wilful falsehood. If you find that any witness
5 has testified falsely you can do one of two things. You can
6 either reject all of that witness' testimony on the ground
7 that it is all tainted by falsehood and that none of it is
8 worthy of belief or you can accept that part which you
9 believe to be credible and reject that part which you believe
10 to be tainted by falsehood.

11 Should you find that all or any part of a
12 particular witness' testimony was false you may not of
13 course infer that the opposite of that testimony is the truth
14 unless there is other evidence to that effect. Any testi-
15 mony rejected by you as false is no longer in the case
16 insofar as any finding that you may make is concerned.

17 You recall that I told you that an inference was
18 a conclusion which reason or common sense leads you to draw
19 from the facts which you find to have been proved. Thus, a
20 finding of fact may not be established merely by a negative
21 inference arising from your disbelief and rejection of any
22 testimony.

23 In passing upon credibility the ultimate question
24 is, did the witness tell the truth here before you. It is
25 for you to say whether his testimony at this trial is

2 truthful in whole or in part in the light of his demeanor,
3 his explanations and all the other evidence in the case.

4 Now, with respect to the defendant, I told you
5 at the outset of this case that the law does not require
6 a defendant in a criminal case to testify or present any
7 evidence on his own behalf. I told that to you a number of
8 times. I have also told you that a defendant is not
9 required under our law to prove his innocence. He is
10 presumed to be innocent at all times and throughout the
11 entire trial unless and until the government proves him
12 guilty beyond a reasonable doubt. For these reasons a
13 defendant need not take the witness stand and testify in
14 his own behalf.

15 The fact that the defendant did not testify in
16 this case does not create any presumption for or against
17 him and I charge you that this fact must not weigh in the
18 slightest against him nor shall this fact enter into your
19 discussions or deliberations in any manner.

20 In your deliberations please do not discuss the
21 question of possible punishment. That is a matter that
22 rests on my conscience and my conscience alone because the
23 judge and the judge alone is the one who has the obligation
24 of imposing sentence when and if guilt is determined.

25 If you do discuss it among yourselves then you

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2 are encroaching upon my function and I ask you not to do it.
3 Your function is to consider the facts and to determine the
4 facts and my function is to pass upon the law and, in the
5 event of conviction, to impose sentence.

6 If you find on all the evidence that the evidence
7 respecting the defendant leaves a reasonable doubt as to
8 his guilt, you should not hesitate for a moment to return
9 a verdict of acquittal.

10 On the other hand, however, if you find beyond a
11 reasonable doubt that the law has been violated as charged,
12 you should not hesitate because of sympathy or because of
13 any other reason to render a verdict of guilty.

14 The verdict must represent the considered judg-
15 ment of each juror. In order to return a verdict it is
16 necessary that each juror agree thereto. Your verdict must
17 be unanimous.

18 It is your duty as judges to consult with one
19 another and to deliberate with a view to reaching an agree-
20 ment, if you can do so without violence to individual judg-
21 ment. Each of you must decide the case for yourself but
22 do so only after an impartial consideration of the evidence
23 with your fellow jurors.

24 In the course of your deliberations do not
25 hesitate to reexamine your own views and change your opinion

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2 if convinced that it is erroneous. But do not surrender
3 your honest conviction as to the weight or effect of
4 evidence solely because the opinion of your fellow jurors
5 or for the mere purpose of returning a verdict. You are not
6 partisans. You are judges. Judges of the facts. Your sole
7 interest is to ascertain the truth from the evidence in the
8 case.

9 Now, if during the course of your deliberations it
10 becomes necessary to communicate with the Court you may
11 send a note by the marshal signed by your foreman or by one
12 or more members of the jury. No member of the jury should
13 ever attempt to communicate to the Court by any means other
14 than a signed writing and the Court will not communicate with
15 any member of the jury on any subject touching on the merits
16 of the case otherwise than in writing or orally here in
17 open court.

18 You will note from the oath about to be taken by
19 the marshal that he, too, as well as all other persons are
20 forbidden to communicate in any way or manner with any member
21 of the jury on any subject touching the merits of the case
22 and bear in mind that you are never to reveal to any person,
23 not even to the Court, how the jury stands numerically or
24 otherwise on the question of the guilt or innocence of the
25 defendant unless and until after you have reached a

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2 unanimous verdict.

3 It is proper to add a caution that nothing said
4 in these instructions is to suggest or convey in any way or
5 manner any intimation as to what verdict I think you should
6 find. What the verdict shall be is the sole and exclusive
7 duty and responsibility of the jury.

8 Counsel have the right and the duty indeed to take
9 exception to any of my instructions here and to request any
10 further instructions of you. I will take that in the
11 absence of the jury.

12 (At the side bar.)

13 MR. ANOLIK: I preserve any exceptions that I took
14 in our pre-charge conference. I don't waive those, your
15 Honor. The only exception that occurs to me, your Honor, I
16 do not recall your Honor charging when we discussed the
17 evidence that they can consider, that they could also
18 consider the lack of evidence. I don't believe you charged
19 that.

20 THE COURT: I had something in there about evidence
21 and lack of evidence.

22 MR. WOHL: I am sure.

23 MR. ANOLIK: I must have missed that.

24 THE COURT: No other requests?

25 MR. ANOLIK: No.

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2 MR. WOHL: In light of Mr. Anolik's summation,
3 your Honor, the government submits you should give the
4 standard instruction on cumulative witnesses, the uncalled
5 witness instruction.

6 MR. ANOLIK: I object to that.

7 THE COURT: I will not do that. I think I have
8 done it in here.

9 (In open court.)

10 THE COURT: Members of the jury, there is another
11 charge I have to give you in connection with the instructions.
12 You have the right to have the indictment with you in the
13 jury room and exhibits that you wish to have.

14 It is customary but it is not required that Juror
15 No. 1 is the foreperson of the jury but you may elect a
16 foreperson -- I don't like to use that word. I don't like
17 it at all. How you conduct your deliberations is pretty
18 much up to yourselves.

19 If lunch is there I suggest to you, however, that
20 you do not deliberate while you are having lunch. The
21 gentlemen have to get lunch too, and you can take about an
22 hour or so.

23 We have the very fortunate circumstance that
24 everybody is still intact here and the unfortunate news that
25 I have to discharge the two alternate jurors who have

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2 performed their duties extremely well with the attention
3 they have given to the case. Their presence was necessary
4 and I do want to thank you with the cooperation of the Court
5 for being here on time. We cannot let you go with the other
6 jurors so please get your belongings now. You go down to
7 the jury room and give in your card indicating the end of
8 your service and sometime or other your checks will be
9 mailed to you.

10 JUROR NO. 7: May we have a copy of the indictment?

11 THE COURT: Yes, that will go in now.

12 Do you have a copy of the indictment?

13 MR. WOHL: Yes, sir.

14 THE COURT: Show it to Mr. Anolik.

15 MR. ANOLIK: I have no objection.

16 JUROR NO. 1: Some of the jurors would like to
17 have the tax returns.

18 THE COURT: Those are Exhibits 1 and 2 and we
19 might as well send them in since there is a request for them.

20 MR. ANOLIK: No objection.

21 THE COURT: Before you get out of here will you
22 look at the exhibits to make sure everything is all right.

23 MR. ANOLIK: May we approach the side bar.

24 (At the side bar.)

25 MR. ANOLIK: Your Honor, neither I nor Mr. Wohl

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2 know why there are certain brown markings on various parts
3 of the indictment or of the returns. We would ask that your
4 Honor instruct them to disregard that.

5 MR. WOHL: Can I look at those?

6 MR. ANOLIK: Sure.

7 MR. WOHL: I am inclined to think that the proper
8 time for this was when they came in.

9 I have no objection, your Honor.

10 (In open court.)

11 THE COURT: In connection with Exhibits 1 and 2,
12 there are some writings in here, very minor ones, but
13 whether minor or otherwise, in brown ink, they are not part
14 of the return and should not be considered by you.

15 JUROR NO. 1: We would like to have the foliage
16 vouchers.

17 JUROR NO. 2: Can we also have the bank statements.

18 THE COURT: We will assemble those for you and
19 send them in. We will assemble the bank statements and
20 foliage checks.

21 Swear the marshal.

22 (Marshal sworn.)

23 THE COURT: Before you retire, you will report
24 your verdict that you find the defendant on count 1 whatever
25 it is and we the jury find the defendant on count 2 whatever

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2 it is.

3 (Jury left the courtroom to commence their
4 deliberations at 1:15 p.m.)

5 THE COURT: Have you got the bank statements?

6 MR. WOHL: The government would contend that all
7 of them --

11 MR. ANOLIK: The check with the vouchers.

12 THE COURT: Check with them and when you agree
13 upon them we will send them in with the marshal.

14 Make yourselves available so if we have to reach
15 you we can reach you on short notice.

16 If you want to agree on the other exhibits and if
17 they call for them we can send them in without my being here,
18 that is all right.

19 MR. ANOLIK: I have no objections to exhibits
20 going in if they specifically ask for them.

21 MR. WOHL: It would be a better practice for us to
22 be here because there is always a dispute about whether they
23 are asking or what.

24 THE COURT: All right.

25 (Note received from the Jury at 2:20 p.m.)

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2 THE CLERK: "The jury requests the following: The
3 deposit slips from the Bank of Tokyo in the name of Harold
4 Roth. Application card for opening account at Bank of
5 Tokyo. Jury Chairman, Dr. Stark."

xx 6 (Court Exhibit 1 marked for identification.)

7 MR. WOHL: Exhibit 4 and Exhibits 5 through 46
8 are being sent to the jury.

9 The 3500 material provided by the government during
10 the trial was as follows: For the witness Pinto,
11 Exhibit 3501 was a memo of conference dated October 20, 1972.
12 Exhibit 3502 consisted of a memo of an interview dated
13 November 11, 1972 and an affidavit of Mr. Pinto also dated
14 November 11, 1972. Exhibit 3503 consisted of Mr. Pinto's
15 grand jury testimony from January 27 and 28, 1975.

16 The 3500 material concerning the witness Herbert
17 Kraus was Exhibit 3510, a memo of contact dated November 16,
18 1973 and Exhibit 3511, grand jury testimony of March 21,
19 1975 and in addition a copy of the file of Mr. Kraus that
20 he provided to the government.

21 THE COURT: I have a note, Court's Exhibit ?, the
22 jury would like the 1969 checks. Signed Jury Foreman, Dr.
23 Stark.

24 Have you got them together?

25 MR. WOHL: We have 1969 checks, your Honor, of the

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2 companies.

3 THE COURT: They want '69 checks. Give them all
4 '69 checks.

5 The other note received earlier, you gentlemen
6 agreed on the documents that had to be sent in.

xx 7 (Court's Exhibit 2 marked for identification.)

8 MR. WOHL: Let the record reflect that we are
9 sending into the jury Government's Exhibits 201 through 218
10 inclusive and Exhibits 99 and 103 through 114 inclusive
11 which we both examined and agree are responsive to the note.

12 MR. NOLIK: Right.

13 MR. WOHL: For the witness Wagner the government
14 provided 3500 material consisting of Exhibit 3521, an
15 affidavit of Mr. Wagner dated June 1, 1973, 3520, a memoran-
16 dum of interview dated October 7, 1972, Exhibit 3522, the
17 grand jury testimony of Mr. Wagner dated January 27, 1975
18 and Exhibit 3523, a letter from Mr. Wagner dated August 13,
19 1971 to Special Agent Wendell of the Internal Revenue
20 Service.

21 Concerning Mr. Gilman, the government provided
22 the following 3500 material: Exhibit 3530, a memorandum of
23 interview dated August 26, 1971, Exhibit 3531, a memorandum
24 of contact dated November 19, 1971, Exhibit 3532, a memoran-
25 dum of contact dated November 29, 1973, Exhibit 3533, a

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2 memorandum of contact dated December 7, 1973 and Exhibit
3 3534, the grand jury testimony of Mr. Gilman dated January
4 28, 1975.

5 Concerning Special Agent Stone, the government
6 provided the following 3500 material: Exhibit 3541, a file
7 entitled, "Collateral File of Giuseppe Gambino, Exhibit 3542,
8 memorandum from Special Agent Wendell to the Manhattan Office
9 of the Internal Revenue Service dated August 13, 1971,
10 Exhibit 3543, a memorandum from Special Agent Stone to the
11 Manhattan Office of the Internal Revenue Service dated March
12 30, 1973, Exhibit 3544, a memorandum from Special Agent
13 Stone to the Manhattan Office of the Internal Revenue
14 Service dated October 13, 1972, and if I am not mistaken,
15 that was the exhibit marked as a defense exhibit also,
16 Defendant's Exhibit C.

17 MR. ANOLIK: Yes.

18 MR. WOHL: Exhibit 3545, a file entitled, "The
19 Collateral File of Charles Gilman Imports, Inc.," Exhibit
20 3546, a file entitled, "Collateral File of Irving Behrman,"
21 Exhibit 3547, the collateral file entitled, "United Flowers."
22 Exhibit 3548 consisting of several pieces of handwritten
23 notations, certain bank statements of the bank account of
24 Wagner-Nelson at the Houston Bank and a summons issued by
25 the Internal Revenue Service to that bank and Exhibit 3549.

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2 a memorandum of Special Agent Stone to the Manhattan Office
3 of the Internal Revenue Service dated June 5, 1973.

4 (Recess)

5 (Note received from jury at 3:50 p.m.)

6 (Jury returned to courtroom at 4:00 p.m.)

7 THE CLERK: Mr. Foreman, has the jury agreed upon
8 a verdict?

9 THE FOREMAN: We have.

10 THE CLERK: How do you find the defendant Irving
11 Behrman in count 1?

12 THE FOREMAN: Guilty.

13 THE CLERK: How do you find the defendant in
14 count 2?

15 THE FOREMAN: Guilty.

16 THE COURT: Poll the jury, please.

17 (Jury polled.)

18 THE COURT: All right, members of the jury, as I
19 told you, you were the judges of the facts and it is not my
20 province to comment upon a verdict except to say that I have
21 appreciated the cooperation that you have given to all of us
22 in coming in here and serving. You have all served beyond
23 the time that you agreed to and signed up for for the two
24 weeks and we had a few delays but you have been most
25 cooperative in being here on time and I want to suggest to

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2 you that, in my opinion, the jury duty is one of the highest
3 functions that a civilian citizen can perform. We take you
4 all from different walks of life and we can see as we went
5 through the selection process how that is arrived at and I
6 urge you at every opportunity that you have to perform jury
7 service and do it willingly and as conscientiously as you
8 did here. You never know when the occasion might arise that
9 you yourself might be involved in a dispute and it might
10 have to go to litigation. I am sure if that were so that
11 you would hope and expect that the jury is as conscientious
12 as you were that would be called in to pass upon the verdict
13 of your controversy.

14 It is only by getting you citizens to get in here,
15 and I know it is a hardship and handicap for some of you to
16 do this, especially at this time of year, but I can't
17 commend you enough. I appreciate very much the assistance
18 to the Court and your performance in your function here and
19 I wish you all well. Happy season. Good luck in everything
20 you do.

21 I assume you have to report back to the jury room
22 and pick up your cards.

23 (Jury excused.)

24 MR. ANOLIK: Your Honor, I would have motions to
25 make. I can make them now or reserve them.

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2 THE COURT: I would like you to reserve. I would
3 like to get a memorandum. You may want to get a transcript
4 here. The government may also want to get it, maybe even
5 arrange to do it. I think this ought to be briefed for me
6 in connection with the actual testimony that was here. I
7 think we have, as I indicated before, some serious problems
8 with respect to this. Mr. Wohl does not agree with me but
9 I do think there are very serious questions in here and I
10 would benefit a great deal by your submitting a memorandum
11 to me in advance of the date that I am going to set for
12 sentencing. I would like a full opportunity to review it
13 and render a decision on your motions that will reflect
14 full review of the appropriate authorities as well as the
15 testimony in this case.

16 We are going to require six weeks for sentencing.
17 That should take us over until about January 28.

18 MR. ANOLIK: I wonder if we can have a date in
19 February, your Honor.

20 THE COURT: February 3.

21 MR. ANOLIK: That will be all right.

22 THE COURT: I would like your memorandum in by
23 the 26th of January.

24 MR. ANOLIK: Can I have the 6th then because I
25 would like the benefit of that weekend. I am going to be

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2 tied up half of January in trial, your Honor. I would like
3 to get one weekend in February if I could, your Honor, to
4 finish it up.

5 THE COURT: That is quite a distant time. I know
6 you are a busy practitioner, Mr. Anolik.

7 MR. ANOLIK: I can do it. If I knew I could get
8 the minutes in the next couple of days it would be one thing
9 but to wait two or three weeks for those minutes.

10 THE COURT: What is the government willing to do?

11 MR. WOHL: The government is willing to cooperate.

12 MR. ANOLIK: If the government orders them
13 expedited.

14 THE COURT: Yes, that is what I am trying to do
15 without pushing the additional burden upon the taxpayers.

16 MR. WOHL: It is probably the thrust of your
17 Honor's --

18 THE COURT: I would like to get you as soon as you
19 can. If Mr. Anolik can get yours beforehand, if you can do
20 it, if your schedule is less crowded than his --

21 MR. WOHL: I will try to answer as soon as we get
22 his papers. We have to know what his points are.

23 THE COURT: I think you know what problems I have
24 with it. Why wait for him to put in a counter-reply brief
25 to his if you put in yours initially.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**UNITED STATES OF AMERICA,
Appellee,**

- against -

**IRVING BEHRMAN,
Defendant- Appellant.**

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

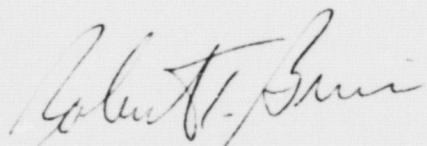
I, James A. Steele being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 West 146th Street, New York, New York
That on the 13th day of April 1976 at One St. Andrews Plaza, New York, New York

deponent served the annexed **Appendix Brief** upon

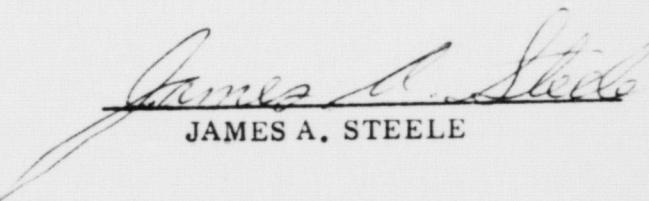
Robert B. Fiske Jr.,

the **Attorney** in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.

Sworn to before me, this 13th
day of April 19 76



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977


JAMES A. STEELE